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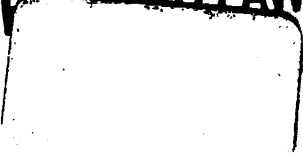
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C F
REPORTS OF CASES

ARGUED AND DETERMINED IN THE

10 York (C. P.)
COURT OF COMMON PLEAS

FOR THE

CITY AND COUNTY OF NEW YORK.

BY CHARLES P. DALY, LL.D.,

CHIEF JUSTICE OF THE COURT.

VOL. VII.

NEW YORK:

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Rec. Nov. 3, 1879

JUDGES

OF THE
COURT OF COMMON PLEAS,
SINCE ITS REORGANIZATION IN 1821,
WITH THEIR PERIODS OF SERVICE.

JOHN T. IRVING	1821—1838
MICHAEL ULSHOEFFER	1834—1850
DANIEL P. INGRAHAM	1838—1858
WILLIAM INGLIS	1839—1844
CHARLES P. DALY	1844 *
LEWIS B. WOODRUFF	1850—1856
JOHN R. BRADY	1856—1869
HENRY HILTON	1858—1863
ALBERT CARDOZO	1863—1868
HOOPER C. VAN VORST	1868—1869
GEORGE C. BARRETT	1869—1869
FREDERICK W. LOEW	1869—1876
CHARLES H. VAN BRUNT	1869 *
HAMILTON W. ROBINSON	1870—1879†
RICHARD L. LARREMORE	1870 *
JOSEPH F. DALY	1870 *
GEORGE M. VAN HOESEN	1876 *
MILES BEACH	1879 * ‡

* Still on the bench.

† Died during his term of office.

‡ Appointed by the Governor to fill the vacancy created by the death of Judge Robinson.

JUDGES DURING THE PERIOD EMBRACED IN THIS VOLUME.

CHARLES P. DALY, CHIEF JUSTICE.
CHARLES H. VAN BRUNT
HAMILTON W. ROBINSON.
RICHARD L. LARREMORE.
JOSEPH F. DALY.
GEORGE M. VAN HOESEN

TABLE OF CASES

REPORTED IN THIS VOLUME.

A

Abham v. Boyd.....	30
Ætna Fire Insurance Co., Cooke v.....	555
Allen v. James.....	18
Allen v. Meyer.....	229
Allt, Smith v.....	492
American Institute, &c., Smith v.....	526
Apgar, Esmond v.....	379
Arnold v. Morris.....	498
Aspinwall v. Balch.....	200
Averill, Schwarzensky v.....	254
Ayer v. Rushton.....	9

B

Balch, Aspinwall v.....	200
Bank of Metropolis, Merchants' Loan & Trust Co. v.....	137
Banks v. Carter.....	417
Battersby v. Mayor, &c.....	16
Bedell v. North America Life Ins. Co.....	273
Belknap v. Sickles.....	249
Benner, Southard v.....	40
Bennett, Meyers v.....	471
Bernstein, Hauger v.....	340
Betz v. Conner.....	550
Blackcker v. The Mayor, &c....	439
Blumhor, Davidson v.....	205
Boyd, Abham v.....	30
Brennan v. Willson.....	59
Brinkerhoff, Dale v.....	45
Brink v. Fay.....	562

Brooks, Sternack v.....	142
Bruce v. Carter.....	37
Burchell, James v.....	531
Burke, Imhorst v.....	54
Burt, Weed v.....	267
Busch, Trunninger v.....	124
Butterfield, Leutze v.....	24

C

Callahan, People v.....	434
Callanan, Van DeWiele v....	386
Carpenter v. Nickerson.....	424
Carter, Banks v.....	417
Carter, Bruce v.....	37
Central Verein of the Her- mann's Soehne, Durian v.	168
Chappell, Johnson v.....	43
Collignon, Meacham v.....	402
Colton, Crow v.....	52
Commercial Ins. Co., Wice v..	258
Conkling, Hill v.....	397
Conner, Betz v.....	550
Conner, Josuez v.....	448
Consolidated Fruit Jar Co. v. Mason.....	64
Cooke v. Ætna Fire Ins. Co....	555
Crow v. Colton.....	52
Curnen v. The Mayor, &c....	544
Cushing v. Vanderbilt.....	512
Cushman v. Thayer Manufac- turing Jewelry Co.....	330

D

Dale v. Brinkerhoff.....	45
Davidson v. Blumhor.....	205

Davis, Matter of.....	1
Davis v. Davis.....	308
Denison v. Ford.....	384
Dethlefs v. Tamsen.....	354
Devlin, People v.....	47
Devlin v. The Mayor, &c.....	466
Dilleber v. Knickerbocker Life Ins. Co.....	540
Devoe Manufacturing Co., Lake v.....	161
Donnelly v. Mayor, &c.....	334
Durian v. Central Verein of the Hermann's Soehne..	168
Dupuy, Phoenix v.....	238

E

Earle v. New York Life Ins. Co.....	303
Easton v. Malavazi.....	147
Eleventh Ward Bank, Har- ley v.....	476
Esmoud v. Apgar.....	379

F

Fay, Brink v.....	562
Flaherty v. Greenman.....	481
Ford, Denison v.....	384
Fuentes v. Mayorga.....	103

G

Gemp v. Pratt.....	197
Glover, Osgood v.....	367
Gortwald v. Tuttle.....	105
Grafton v. Weeks.....	523
Gregory, Noe v.....	283
Greenman, Flaherty v.....	481
Griswold v. Tompkins.....	214
Grunhut v. Rosenstein.....	164

H

Harley v. Eleventh Ward Bank	476
Harteau, Rae v.....	95
Hauger v. Bernstein.....	340
Haupt, Howe Sewing Machine Co. v.....	108
Haviland v. Johnson.....	297
Health Department of the City of N. Y. v. Pinckney.....	260

Heim v. The Metropolitan Life Ins. Co.....	536
Hernandez v. Stilwell.....	360
Hernandez, Stilwell v.....	485
Heydecker v. Lombard.....	19
Hill v. Conkling.....	397
Howe Sewing Machine Co. v. Haupt.....	108
Howe Machine Co. v. Robinson	399
Hoyt, White v.....	232
Huebner v. Roosevelt.....	111
Hynes v. McDermott.....	513

I

Imhorst v. Burke.....	54
-----------------------	----

J

James, Allen v.....	13
James v. Burchell.....	531
Japha, Plonsky v.....	226
Johnson v. Chappell.....	43
Johnson, Haviland v.....	297
Jones, Wagner v.....	375
Josuez v. Conner.....	448

K

Kinzey v. Kinzey.....	460
Knickerbocker Life Ins. Co., Dilleber v.....	540
Koehler, Prime v.....	345
Krekeler v. Thaulle.....	152

L

Lake v. Devoe Manufacturing Co.....	161
Lang, Palmer v.....	33
Leutz v. Butterfield.....	24
Lombard, Heydecker.....	19
Lumley, Thompson v.....	74
Lynch v. McNally.....	126
Lynch, West v.....	245
Lyons, People v.....	182

• M

McDermott, Hynes v.....	513
McLean, Oberwarth v.....	70
McNally, Lynch v.....	126
Mahler v. Schloss.....	291
Malavazi, Easton v.....	147

TABLE OF CASES REPORTED.

vii

Mason, Consolidated Fruit Jar Co. v.	64
Matter of Davis.	1
Page.	155
Rice.	22
Mayor, &c., Battersby v.	16
Bleecker v.	439
Curnen v.	544
Devlin v.	466
Donnelly v.	334
Paul v.	144
v. Ryan.	436
Waterman v.	489
Mayorga, Fuentes v.	103
Meacham v. Collignon.	402
Merchants' Despatch Transportation Co., Weil v.	456
Merchants' Loan & Trust Co. v. Bank of Metropolis.	137
Merrill v. Thomas.	393
Metropolitan Life Ins. Co., Heim v.	536
Meyer, Allen v.	229
Meyer, White v.	428
Meyers v. Bennett.	471
Morange, Wiener v.	446
Morris, Arnold v.	498
Mowry v. World Mut. Life Ins. Co.	321

N

New York Elevated R. R. Co., Ninth Ave. R. R. Co. v.	174
New York Juvenile Guardian Society v. Roosevelt.	188
New York Life Ins. Co., Earle v.	303
Nickerson, Carpenter v.	424
Ninth Ave. R. R. Co. v. New York Elevated R. R. Co.	174
Noe v. Gregory.	283
North America Life Ins. Co., Bedell v.	273

O

Oberwarth v. McLean.	70
Oppold, Schwarz v.	121
Osgood v. Glover.	367

P

Page, Matter of.	155
-----------------------	-----

Palmer v. Lang.	33
Patrick, Solinger v.	408
Paul v. Mayor, &c.	144
People v. Callahan.	434
v. Devlin.	47
v. Lyons.	182
v. Wissig.	23
Pinckney, Health Department of the City of N. Y. v.	260
Phoenix v. Dupuy.	238
Plonsky v. Japha.	226
Pratt, Gemp v.	197
Prigge, Toope v.	208
Prime v. Koehler.	345

R

Radde, Westerfield v.	326
Rae v. Harteau.	95
Rice, Matter of.	22
Robinson, Howe Machine Co. v.	399
Roosevelt, Huebner v.	111
Roosevelt, New York Juvenile Guardian Society v.	188
Rosenstein, Grunhut v.	164
Rowell, Schenke v.	286
Royce v. Watrous.	87
Rushton, Ayer v.	9
Rushton, United States Reflector Co. v.	410
Ryan, Mayor, &c. v.	436

S

Salomon, Smith v.	216
Schenke v. Rowell.	286
Schloss, Mahler v.	291
Schwarz v. Oppold.	121
Schwarzansky v. Averill.	254
Seiler, Zinsser v.	464
Sickles, Belknap v.	249
Smith v. Allt.	492
Smith v. American Institute, &c.	526
Smith v. Salomon.	216
Solinger v. Patrick.	408
Southard v. Benner.	40
Sternack v. Brooks.	142
Stilwell v. Hernandez.	485
Stilwell, Hernandez v.	360

T

Tamsen, Dethlefs v.	354
--------------------------	-----

Thaule, Krekeler <i>v.</i>	152
Thayer Manufacturing Jewel- ry Co., Cushman <i>v.</i>	330
Thomas, Merrill <i>v.</i>	393
Thompson <i>v.</i> Lumley.....	74
Tompkins, Griswold <i>v.</i>	214
Toope <i>v.</i> Prigge.....	208
Trunninger <i>v.</i> Busch.....	124
Tuttle, Goltwald <i>v.</i>	105

U

United States Reflector Co. <i>v.</i> Rushton.....	410
---	-----

V

Vanderbilt, Cushing <i>v.</i>	512
Van De Wiele <i>v.</i> Callanan....	386

W

Wagner <i>v.</i> Jones.....	375
Waterman <i>v.</i> The Mayor, &c.	489

Watrous, Royce <i>v.</i>	87
Weed <i>v.</i> Burt.....	267
Weeks, Grafton <i>v.</i>	523
Weeks, Young <i>v.</i>	115
Weil <i>v.</i> Merchants' Despatch Transportation Co.....	456
West <i>v.</i> Lynch.....	245
Westerfield <i>v.</i> Radde.....	326
White <i>v.</i> Hoyt.....	232
White <i>v.</i> Meyer.....	428
Wice <i>v.</i> Commercial Ins. Co..	258
Wiener <i>v.</i> Morange.....	446
Willson, Brennan <i>v.</i>	59
Wissig, People <i>v.</i>	23
World Mut. Life Ins. Co., Mowry <i>v.</i>	321
Wright, Wright <i>v.</i> (No. 1)...	55
Wright <i>v.</i> Wright (No. 2)...	62

Y

Young <i>v.</i> Weeks.....	115
----------------------------	-----

Z

Zinsser <i>v.</i> Seiler.....	464
-------------------------------	-----



Hamilton W. Robinson

IN MEMORIAM.

HAMILTON W. ROBINSON

Died April 7th, 1879, during his term of office.

A meeting of the members of the Bench and Bar of New York was held on Thursday, April 24, 1879, at the Court House in the city of New York, to express their sentiments upon the decease of the late Hamilton W. Robinson, Judge of the Court of Common Pleas.

The following officers were elected:—

President, HON. CHARLES P. DALY.

Vice-Presidents:

HON. NOAH DAVIS,
HON. JOHN R. BRADY,
HON. CHARLES DONOHUE
HON. GEO. C. BARRETT,
HON. A. R. LAWRENCE,
HON. WILLIAM E. CURTIS,
HON. GILBERT M. SPEIR,
HON. H. C. VAN VORST,
HON. CHAS. F. SANFORD,
HON. JOHN SEDGWICK,

HON. J. J. FRIEDMAN,
HON. SAMUEL BLATCHFORD,
HON. WILLIAM G. CHOATE,
HON. CHARLES O'CONOR,
HON. DAVID DUDLEY FIELD,
HON. JOHN K. PORTER,
HON. WILLIAM A. BEACH,
HON. LUCIEN BIRDSEYE,
HON. STEPHEN D. LAW.

Secretaries:

JOHN M. SCRIBNER, JR., Esq.,
DOUGLAS CAMPBELL, Esq.,

JAMES J. THOMSON, Esq.,
JAMES T. LAW, Esq.

MR. A. J. VANDERPOEL said:—

We have met to pay respect to the memory of the late Hamilton W. Robinson. While this tribute is due to his

character as a lawyer and as a judge, it is also a tribute and token of our respect and affection for him as a man.

For nine years he had been a member of the Bench of the Court of Common Pleas of the city and county of New York. Thirty years of hard labor and varied practice at the Bar had thoroughly fitted him for this position, from which an all-wise Providence has removed him in the prime of life and season of usefulness. He was justly noted for the patient study and careful preparation of his cases, and every question likely to arise was fully investigated and brought to the test of his well-balanced mind. In his bearing he was diffident and unobtrusive ;—in his friendships, cordial and sincere. As a judge he always remembered “that a judge must never allow himself to be warped or trammelled, and must ever maintain the free employment of a watchful and unbiassed mind.”

Mr. VANDERPOEL then offered the following resolutions :—

Resolved, That by the death of Judge Hamilton W. Robinson we have lost one who was an honor to the judiciary and to our profession. His urbanity of manner while at the Bar and on the Bench, his sincerity of heart and faithfulness to duty had endeared him to us ; while his learning, probity and justice commanded for him universal respect. We cherish pleasant recollections of his well-spent life, and revere his memory as an able and upright judge.

Resolved, That the proceedings of this meeting be presented to the court of which Judge Robinson was a member, with the request that they be entered upon its minutes.

Mr. LUTHER R. MARSH said :—

Mr. PRESIDENT :—In rising to second the resolutions presented by Mr. Vanderpoel, which so truly deplore our loss, a few additional words may not be out of place.

So rapid are the changes in our Bar ; such a tide of new practitioners is constantly poured into it from all sections of the nation, that there are many here, no doubt, who have

only known him,—whose loss has called us together,—in his office as a judge.

There are some present,—among them his class-mates Judge Speir and Samuel Campbell,—whose memories hold the slender form of a beaming and studious youth at college; ambitious of honor, free from any evil habits, and on terms of cheerful amity with all his co-collegiates.

Some, too, here, remember him, when afterwards graduated from college, and from a counsellor's office, he had taken rank as a lawyer at Albany, in association with Van Buren and MacKown;—Albany, where there were centred many men famous in the records of the Bar.

Some, too, remember him when, seeking a wider field, he encountered the hazards of a removal to this city,—where only courage, effort and pertinacity could secure a foothold,—and by his modest sign announced that he would give his time and labor to those who should intrust their interests to his hands.

He returned, temporarily, to Albany, to officiate as deputy attorney-general under Mr. Van Buren; and, subsequently, they united in partnership, and so for many years continued in New York, where a clientage, large in volume and responsible in character and amount, grew up around them; numbering in its list George Law, and the great and varied interests he controlled.

The services of almost every lawyer are, at one time or another, called into use as a mutually selected arbiter; and for this Judge Robinson developed such a special adaptation that he became, and was for several years, our most active and prominent referee—thus becoming especially educated to the duties of the office he was subsequently to fill. The proportion of causes disposed of by referees is very large; and they are often of the most troublesome and complex kind, involving many-itemed accounts, which a jury cannot try. The referee unites in himself the functions of juror and

judge; and, but for him, I do not see how the courts could keep abreast of the accumulated business of the time. Of these referees, as I have said, Judge Robinson was, in his day, the most conspicuous; and such quantities of references flocked to his office, either by mutual consent or the compulsory orders of the courts, that he might often be seen presiding at the trial of two, three, and even four causes at the same time—walking through his ample rooms to the various tables, and disposing of questions of pleading and evidence as he passed.

Judge Robinson, when he came to the Bench, had well withstood the strain of his professional labors. He was, I believe, in perfect health. It is a question of some moment whether, if he had remained at the Bar, he would not now have been living and in full capacity. So many of our judiciary have become impaired in health, that it suggests a very serious inquiry as to the cause. Comes the trouble from the over-breathed air of crowded rooms, or from the perpetual and unrelieved stress of judicial duties—peculiarly responsible and exhausting—or from the joint effect of both?

And yet it would not seem to be safe to deduce any general principle from a limited range of facts; for on that very Bench in which this sad vacancy occurs, there presides a jurist who has administered at its shrine for more than a generation; who has carried on, besides, immense concurrent labors; who has gathered and recorded the annals of that historic court; who has been ever ready to take part in all public meetings and aid in all public enterprises; who, by his wise devotion to geographic science, has made his name familiar and respected over the world, and yet, who still bears the evidence of health undiminished and vigor unimpaired.

It was a pernicious habit,—induced by his sensitively nervous organization and the anxieties of his office,—which used to drive our departed friend, at midnight, from his bed

to his table, when many of his opinions were written and revised. He must possess a large original stock of vitality whose constitution can long sustain the drafts upon it required by the intense and varied application of the day time in our city practice, and carry protracted labor into the night besides. An habitual encroachment on the domain and jurisdiction of

“Tired Nature’s sweet restorer—balmy sleep,”

is, sooner or later, sure to be avenged.

He was a faithful and concentrate worker. But notwithstanding the remarkable facility with which he wrote, he used to revise and re-revise till his manuscript opinions almost required a Champollion to decipher them. I have been reminded, sometimes, while puzzling over his manuscripts, of a paper I saw when a student at Utica. There was, in the office of the late Charles A. Mann, a chest of historical documents, left by Richard Varick. Amongst them, a draft petition to Congress, by Baron Steuben, for some additional aid, as I remember it. It was in the handwriting of Alexander Hamilton—whose pellucid style vindicates his renown as a writer—from whom, by the way, our late friend derived a portion of his name—and its erasures and interlineations evinced that it was not struck off at white heat, and at a blow; that it did not drop without labor from the nibs of the pen; but had received many a careful revision and correction.

It was, however, in his social relations—in the company of his family and friends—that Robinson was king. His supremacy there was affectionately acknowledged. It is believed that he never lost a friend: rather, he bound them to him with enduring cords. Some of his boyhood and college class-mates have kept up with him, through the vicissitudes of life, the most intimate relations; and we need only witness the afflicting sorrow they express, to know how supremely he reigned in the domain of the affections.

His great pleasure was to spend the summers on his ancestral acres at Worcester, in the county of Otsego,—where he dispensed a charming and bountiful hospitality. He dreamed in his illness that the crisp air of the Otsego hills—resinous with the delicious odor of the woods—would renew his strength, like the eagle's; and that could he but touch his mother earth, he would, Antæus-like, receive new vigor in his frame. But he had approached too near the confine for any natural means to bring him back. And so, his mission here ended, he has gone to join the generations on the other side of the line; where our friends, in large majority, already are;—the ultimate destination and home of all.

Mr. LUCIEN BIRDSEYE said :—

Mr. CHAIRMAN and GENTLEMEN :—My long acquaintance with Judge Robinson, the kindness with which he welcomed me to the ranks of the profession, and the earnest regard which was the fruit of my long intercourse with him, render it a privilege to me, painful indeed but real, to join in these tributes to his memory.

When I commenced practice in Albany, Mr. Robinson had been some years at the bar. Although, while there, he had been but the junior member of his firm—that of MacKown, Van Buren & Robinson—he had already made his mark as a lawyer. Mr. MacKown was recorder of Albany. Presiding as he did at the monthly sessions of his court, and feeling the burdens of his great age and increasing infirmity, he had substantially withdrawn from active participation in the business of the firm. The tastes and aptitudes of Mr. Van Buren led him to engage in the contests of the bar and of the political arena, rather than in the severe studies and what to so many seem the dry labors of the law office; while these were precisely adapted to the tastes, and called forth all the powers of Mr. Robinson. Thus the business of the firm

had passed at an early day largely into the hands of Mr. Robinson.

He, however, left that firm, and came to New York to engage in practice. I think his residence here at that period was too brief to do much more than prove his sagacity in selecting the field of his life's labors, and the real strength of character which underlaid all his modesty and self-distrust. For, without both sagacity and force of will, he would not then have ventured into such a field.

When Mr. Van Buren was chosen attorney-general he induced Mr. Robinson to return to Albany to act as his chief assistant in that office, while he himself became still more completely the popular advocate and orator.

Taking up also the business of his former firm, the preparation of pleadings, opinions and briefs fully occupied his time, and led him far and wide in legal studies and examinations. At this period of his life, and indeed for many years afterwards, he was but rarely seen, and still more rarely heard, in the courts.

The bar of Albany was then a very strong one. Among those most frequently seen and heard in the courts, and who were famous throughout the State and beyond it, were, besides Mr. Van Buren himself, such men as Samuel Stevens, Marcus T. Reynolds, Daniel Cady, Teunis Van Vechten, Nicholas Hill, Rufus W. Peckham, Azor Taber, Julius Rhoades, Deodatus Wright, Henry G. Wheaton, Samuel H. Hammond and others.

But besides these men, famous as advocates and orators, there was then in Albany, as there must be at every bar, a class of men marked by characteristics very different.

Of retiring dispositions, distrusting themselves in the active contests before courts and juries, hardly becoming accustomed or willing to hear their own voices, but yet knowing well their own powers of study and examination and logical statement, they gave themselves up to the labors of

the office and the library, rather than of the court room. They made the deep researches into legal principles; prepared the careful array of authorities; and made the thorough preparations for trials and arguments, which, after all, are the real ground for professional success.

Among the men of this class were Gideon Hawley, Cyrus Stevens, George W. Peckham, Peter Cagger, Stephen D. Van Schaick, our late lamented surrogate in this city, Mr. Robinson, and others. Some of these men, either by the native force of their character, or under the pressure of circumstances, as when the advocate of the firm had fallen, or been laid aside, overcame the modesty of their natures, and became useful and successful in the more active and public duties of the courts.

Eminent as the bar of Albany then was for the ability and eloquence of its leading advocates, it may well be doubted whether it was not equally strong in the learning, the industry, the acuteness, the skill and the vigilance of those who, according to the English classification of our profession, would have been known only as attorneys and solicitors.

Such men as Mr. Cagger, Mr. Van Schaick and Mr. Robinson, were *powers*, not only in their several offices, but in the courts, where they seldom appeared, and even in general business and public affairs. Each performed great labors and discharged with success great responsibilities. If, as has sometimes been the fact, the public, not knowing whose were the real labors that contributed so much to the triumphs of the bar, gave the fame and reputation to those whose voices had been heard there, rather than to those who had, in fact, but in private, done so much both to deserve and to command those successes, it was not strange. I am sure that none of the gentlemen I have named ever experienced a pang of disappointment, or felt any thing but the desire to accomplish, in their several spheres, all that was possible to protect and promote the rights and interests of their clients.

Soon after the close of Mr. Van Buren's term of office as attorney-general he and Mr. Robinson removed to this city. Here Mr. Robinson, though still disinclined to appear in the court room, became well, if not widely, known for his great learning, his quick perceptions, his instant grasp of the points of a case, his logic, his power of legal statement; in short, for all that marks the lawyer and the judge.

As a consequence, he was sought as a referee. It was not at all the patronage of judges, but the free choice of attorneys and parties, that made his offices to resemble rather a crowded court room than the chambers of a very modest, quiet and retiring member of the profession.

Scarcely had Mr. Van Buren retired from active practice when those engaged in the litigated business of this city seemed to discover, as by common consent, that here was a great lawyer and a great judge ready at their hand. The labors and studies of his early life had borne their fruit. And some years later, when this court was re-organized, this verdict of the profession was ratified by that of the people, and he was placed on the bench of this court.

In what manner he discharged the duties of his high office needs not to be told in this place or this presence. On his own part, with what assiduity and faithfulness; with what fullness of learning; with what wide research; with what quickness of perception; with what patience; with what gentleness of demeanor and kindness of heart; with what singleness of mind, and simple purpose to perform every day the duties of that day; and on the part of others, with what genuine, universal confidence in his uprightness, his purity, his unselfishness, his supreme love of right and truth and justice; I do not attempt to speak. For are not all these things recorded in all that he has done in this court, and engraven on the memory of us all?

Let me, rather, say a few words of his personal character,
VOL. VII.—B

as it impressed itself upon me during a friendship of many years.

It was my good fortune to become his friend at the very beginning of my own professional life ; to have seen much of him while we dwelt in Albany ; to have followed him thence to New York at an early day, and in no small part because of his advice ; to have had my own chambers, for some years thereafter, almost in common with his own ; and during that time, and always afterwards, to have regarded him with affection and esteem.

Few men were better adapted to inspire esteem or affection.

The same qualities of the mind and the heart which seemed to withhold him from the forum made him delightful as a companion. Genial, quick, ready, keenly appreciating wit and humor, as ready and as strong in conversation as in the use of the pen, sincere, simple in tastes and pleasures, of a memory quick, ready and correct, how could he be other than he was ;—the charming companion, the friend, faithful, trusting and trusted, loving and beloved ?

That trait which has to me seemed, perhaps, the most noteworthy in the character of our departed brother, was the quickness, the clearness, the directness of every operation of his mind and heart. What with others was a process, with him seemed oftentimes to be a result. What other minds sought by induction, and with pains and labor, he appeared often to reach as if at a glance. And this quickness and purity of his mental operations was joined with, if not in large part derived from, the quickness and purity of all the feelings of his heart. His sympathies were ready. He was himself last in his own thoughts. And so he was considerate of the rights and interests, the enjoyments and pleasures of all around him.

In reviewing the career now closed, so long, so full of honor, and of all useful service, public and private, one is, I

think, reminded of a somewhat similar career, long since passed into the history of our profession.

It is now a little more than a hundred years since an English lawyer was promoted to the court of the King's Bench, where he was long the associate and friend of Lord Mansfield, who desired him to be his own successor as chief justice. When Francis Buller was made judge in the highest common law court of England, it is said that the propriety of his appointment was questioned, because of his want of prominence and success as an advocate at the bar. But he adorned the bench of that court for nearly a quarter of a century. He proved to be, almost, as it were, by nature and instinct, a great jurist, a great *nisi prius* lawyer, a great judge. His book upon the practice at *nisi prius* was the first effort to state in a formal or scientific manner the principles of that part of the science of our profession. It has done much, especially in the writers whom he has led to treat of the same subject, to throw light upon what was in his day a very obscure, and must ever be a very important and difficult branch of practice.

Certainly it cannot be said that the elevation of Judge Robinson to the bench was any thing like the experiment which the appointment of Mr. Justice Buller was at first thought by some to be, but which resulted so happily. For, at the time of his nomination and election, Judge Robinson (almost unknown as he was in the more active walks of his profession) had really passed through a more careful professional and judicial training than was at all known to or appreciated by most of his brothers at the bar. His whole career upon the bench has shown how his great natural powers had been disciplined and supplemented, by long and deep study and large experience, to fit him for his eminence as a lawyer and a judge.

Still, it seems to me, that in the tone and character of their minds; in the amplitude and readiness of their learn-

ing ; in their fitness for judicial labors ; in their fondness for and faithfulness in those duties ; and in the ease and clearness of their legal statements, these two great judges were very much alike.

Indeed, I think it may be said, that in respect of all those qualities which render a lawyer and a judge really useful and great, Judge Robinson was singularly well endowed.

Happy was he that in his life he secured so much of the respect and the love of all who came within the sphere of his influence ; and that, at his death, he is found to deserve so well the admiration of those who shall come after him.

HON. H. C. VAN VORST, justice of the Superior Court, said :—

The life and character of Hamilton W. Robinson, in whose memory the bar of New York is this day assembled, are interesting to contemplate and study.

There was a remarkable unity in the development of his life from its beginning to its close.

In college, although among if not the youngest of his class, his whole course was marked by a diligent and thoughtful attention to his studies and duties.

He properly, although then a mere youth, regarded this period of his life as truly formative, and as likely to give direction and character to his future career. Evil habits were avoided and good ones formed.

I have heard him in after years speak with much feeling of the preparatory training and discipline which he received from his father, whose heart seemed wrapped up in the life and future of his son.

He gratefully acknowledged the ever present and inspiring influence that father exercised on him.

He had marked out for himself a life of devotion to the profession of the law, in the principles of which he was always deeply interested. He always loved his profession, and in his life honored it.

His early training had prepared him for a useful and successful career. But this he knew could only be realized by constant study and earnest application.

He never suffered himself to be drawn aside from his duties, or to miss the mark upon which his eyes were always fixed, by any pursuits or interests which would hinder his onward progress.

As his tastes would have preferred, so he was led into a plane of professional business important in its character, and which gave full play to the excellent qualities of his mind. The interests of his litigations were generally large, and the legal questions involved serious.

While a junior to others, much of the effective preparation of cases fell upon him. He seemed to anticipate and guard himself and his case against all difficulties likely to arise, and was prepared to meet unusual exigencies. He enjoyed the confidence of his clients to a large degree. This confidence was always merited and respected, and to the end of his life he held the esteem of all with whom he had held professional relations.

He was fitted by education, training, and mental constitution to be a judge.

And in the course of years, he was called to a place upon the bench of this honorable court. But on the day he took his seat with his respected associates, he was in truth already an experienced and useful judge.

He had been disciplined into habits of careful thought and sound judgment.

He was already fitted thoroughly to analyze evidence, and reach the truth amid conflicting statements, and to apply the controlling legal principles. He had an inborn love of justice and equity. He was always considerate and impartial. He was not hasty in his conclusions, but accepted results only when his judgment and conscience were satisfied. He had a just regard for authority, which he had been educated

to respect, and in his decisions always remembered that it was the province of the judge to interpret and not to make the law.

When his judgments and decisions come to be considered, they will be found to be reasonable and just in their scope and substance, and clear and logical in statement. He was patient in the hearing of causes, kind, considerate and courteous in his demeanor to counsel engaged. The cause of justice and the rights of parties were always safe in his hands. And although his life, measured by years, was not long, yet through its work and fruit it was complete and beautifully rounded.

"That life is long which answers life's great end," and in this regard his work was thoroughly well done.

We may well deplore the loss of one so excellent as a man, so sincere and kind as a friend, and so upright and just as a judge.

Chief Justice CHARLES P. DALY then said :—

It is proper, gentlemen, that some expression should be given by this court, of which Judge Robinson was a member, on the loss it has sustained in his decease. It is very gratifying to us, his late colleagues, to hear the tribute paid to his memory in the remarks which have just been made, and to witness the even much more substantial tribute paid by this large assemblage of the profession. It was at my particular request that Judge Robinson consented to become a candidate for the judgeship of this court. We had reason to be particularly gratified, as he had previously declined a nomination for judge of the Court of Appeals, and at a period when his election to that position was deemed certain ; an assurance which was confirmed by the very large majority accorded to those who were afterwards elected. I say we had reason to be particularly gratified as members of the court that he consented to become a candidate for election, and were much more so with the association that followed

upon his election. I have had some experience in judicial life; I have had some contact with judges, and a large contact with members of the bar; and I only pay a just tribute to my deceased colleague when I say that no one with whom I have ever come in contact in the discharge of intellectual duties fulfilled, in my judgment, all the requirements, so much as he did. Gentle in his nature, painstaking, accurate and conscientious, there was no amount of labor that he was not willing to bestow, no attention that he was not prepared to give. Where industry is stimulated by exceeding conscientiousness as it was in his case, it naturally followed that great confidence was felt in his conclusions, springing as they did from so pure a motive, and after so diligent and laborious an exercise of all the qualities which are requisite to secure a sound judgment upon any thing. It was not only in this respect that he was most valuable to us, but if I may be permitted to use what is not common upon public occasions, he was very dear to us for other qualities. I think there is an old Russian proverb that says "you never know any thing of a man until you have made a campaign with him;" and my experience is that you know comparatively little of a judge unless you are associated with him in the discharge of official duties. You then see more clearly the motives by which he is actuated. You see a great deal which the world can never see. You get an insight into his finer and better qualities which is not perceptible to those outside; and it is this knowledge which makes the loss of Judge Robinson to us a very great one. We can all unite in the statement that during the period he was in the Court the greatest harmony prevailed in our intercourse with him, which was never in any way affected. When there was difference of judgment on his part there was always that kindly bearing which it is easy to remember, but difficult to express; a uniformity and gentleness of character which was exceedingly attractive in official intercourse. He always met us with a pleasant smile,

and such a thing as an unkindly word never passed his lips ; nor so far as the human countenance is an index did he ever appear to harbor an unkindly thought. We are especially grateful to the gentlemen who have taken the trouble upon this occasion to call particular attention to the special merits of our deceased colleague—Mr. Marsh, Judge Birdseye and Judge Van Vorst. They have dwelt upon the intellectual and moral qualities by which he was distinguished so fully that it is unnecessary for me to say any thing more. I can only say, gentlemen, in conclusion, that we feel his loss much more deeply than it is in our power to express, for those things are felt most which are beyond expression. We are exceedingly grateful for the tribute which has been paid to his memory, and none know better than we do how justly it has been bestowed.

The question was then put upon the adoption of the resolutions that had been offered by Mr. Vanderpoel and the resolutions were adopted.

Upon motion of Mr. Charles Tracey the secretary of the meeting was directed to transmit a copy of the resolutions to the family of Judge Robinson, and also to furnish copies to the public press for publication.

The meeting then adjourned.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
FOR THE
CITY AND COUNTY OF NEW YORK.

**IN THE MATTER OF THE APPLICATION OF THEODORE M.
DAVIS, RECEIVER OF THE OCEAN NATIONAL BANK
FOR A SUBSTITUTION OF ATTORNEYS.**

(Decided February 5th, 1877.)

A party to certain suits in this court having applied for a substitution of attorneys, an order of reference was made to take testimony and report the same with his opinion as to whether such substitution should be ordered, and if so upon what terms. A large amount of testimony was taken before the referee as to the amount, nature and value of the services of the attorneys sought to be removed, and the referee made his report advising that the substitution should be ordered upon certain payments being made and security given by the party applying therefor. After this report had been filed the applicant prayed leave to withdraw his application for a substitution and to have the report vacated upon such terms as to payment of costs as should be just: *Held*, that under the circumstances, the application should be denied; that the applicant having invoked the jurisdiction of the court over the dispute between himself and his attorney and litigated on the reference the amount due from him to his attorneys, he should not be allowed to escape the effect of the court's decision on that point; that the report should be confirmed so far as it was found correct, in order that the attorneys

VOL. VII.—1

Matter of Davis.

might have the benefit of such force as it might have as evidence in any suit between themselves and the applicant to recover for the services rendered by them in the suits in which they were sought to be removed.

Security for payment for services of an attorney in suits in another court will not be required as a condition of ordering another attorney to be substituted in his stead in suits in this court.

APPEAL from an order made at special term by Judge VAN BRUNT confirming the report of a referee to whom upon an application for substitution of other attorneys in four suits pending in this court, in the place of F. N. & C. W. Bangs, (who were unwilling to render any further services therein until payment was made for services already rendered; upon the amount of which the applicant and his attorneys were unable to agree;) it had been referred to take testimony and report the same with his opinion as to whether substitution should be ordered, and if so upon what terms; what sum if any should be paid to said attorneys upon substitution, and what security, if any, should be required for such portion of their claim as should not be paid on substitution. The order of Judge VAN BRUNT confirmed the report of the referee upon the merits, but provided that upon payment by the applicant of the expenses which his application had caused the attorneys proceeded against, he might as a matter of favor withdraw his application, and that upon such payment and withdrawal, the report should be vacated. From this portion of the order the attorneys proceeded against appealed.

S. W. Fullerton, for appellant.

George Bliss, Jr., for respondent.

CHARLES P. DALY, Chief Justice.—The applicant desiring to substitute another attorney for the Messrs. Bangs, in the four suits pending in this court, and he and the Messrs. Bangs being unable to agree as to the amount of their compensation for their services as attorneys and counsel in these suits, he made an application to the

Matter of Davis.

court for the substitution of another attorney ; and the court after hearing the parties, ordered it to be referred to a referee to take testimony and report the same with his opinion, as to whether such order should be made, and if so, upon what terms ;—what sum, if any, should be paid to said attorneys and counsel, and what security, if any, should be required for such portion of their claim as should not be paid upon the substitution. Under this order, there was a hearing before the referee, which went on from May to October,—broken only by the summer vacation,—during which a large amount of testimony was given by Messrs. Bangs as to the nature of the services which they had rendered, and as to their value. On the 12th of July, 1876, the testimony on behalf of Messrs. Bangs was closed, and the reference was adjourned to the 25th of September, that the applicant might give testimony ; but on that day it was further adjourned at the plaintiff's request to the 28th of that month. On September 28th, Mr. Sly, who appeared for the applicant on the reference, applied, upon the ground of his inability to obtain the attendance of witnesses and on account of the absence of the applicant, for a further adjournment to October 2d, which was granted ; and on the 2d of October, Mr. Bliss, through Mr. DaCosta, the counsel of Messrs. Bangs, proposed to settle the claim for \$6,000—to which Mr. Bangs at first objected, but finally assented, if Mr. Bliss would, on the succeeding day, send down an offer of judgment for \$6,000—and the amount of the printer's bill, which was not done ; but two days after that time, an offer of judgment for \$6,000 without any offer to pay the printer's bill was made by Mr. Bliss to Mr. DaCosta, which being communicated to Mr. Bangs, he declined to accept it. The reference was further continued by adjournments, no evidence being given by the applicant ; but a correspondence passed between Mr. Bliss and Mr. Bangs, which led to no result ; and on the 21st of October, Mr. Bliss gave notice to Messrs. Bangs and their attorneys, that the motion for a substitution of attorneys was withdrawn and countermanded ; that the referee, Mr. Hall, had been asked for his bill, which would be paid ; and ten-

Matter of Davis.

dering the costs of the motion. Two days afterwards, the referee filed his report, which was, that the applicant as a condition of the granting of the substitution, should pay to the Messrs. Bangs, within ten days, the sum of \$9,714 70, including referee's fees, \$175 and Stenographer's fees, \$93 68; the expenses of printing, \$150; and for counsel fees, \$500; and that he should deposit in this court \$3,012 70, as security to the Messrs. Bangs, for the payment of such sum as they may establish as being due to them in other suits which are not in this court.

Notice of the filing of the report having been served, the applicant filed and served exceptions to it on October 31st; and on November 2d the Messrs. Bangs served notice of hearing of the report and exceptions, for November 10th; and on the 3d of November gave notice to the applicant that he might take further testimony if he desired; but the applicant did not avail himself of the offer. On November 6th the applicant obtained an order to show cause why the report "should not be set aside and held for naught," and this motion and the motion of Messrs. Bangs for the hearing of the report and the exceptions to it, was, on the 4th day of December, heard before Judge Van Brunt, who held:

1st. That the applicant having submitted to the court for determination, the question as to the amount due Mr. Bangs, could not withdraw the same except by leave of the court, and upon such terms as the court should impose, and that the referee, therefore, was correct in proceeding with the reference, and filing his report, and that his doing so afforded no ground for exception to this report, and presented no cause for setting it aside; but 2d, as the necessity for a substitution had passed, that the plaintiff should be allowed to withdraw his application for a substitution, upon the payment of the expenses which Messrs. Bangs had been put to by reason of the motion; that is, the referee's fees; a suitable counsel fee, if they had employed counsel, to attend to their interest before the referee, and also the costs of the motions; that if these terms were not accepted, the referee's report should be confirmed and substitution

Matter of Davis.

ordered upon the payment of the amount reported due by the referee.

As I understand Judge Van Brunt's decision, he overruled the exceptions and confirmed the report to the extent of allowing the substitution upon payment of the amount reported due by the referee, which was not confirming that portion of the report that required the applicant to deposit in this court \$3,012 70, as security for the other suits; and the present appeal is brought, from that portion of the judge's order, which allowed the plaintiff to withdraw his application for a substitution, upon complying with the terms imposed.

It appears from the papers before us, that so far as the judge was influenced by the consideration, that the necessity for a substitution had passed by the final determination of the action in which substitution was desired, he was mistaken as to that fact. None of the suits had been finally determined, and in the Wisner suit, nothing had been determined. The applicant having invoked the aid of the court to compel a substitution of attorneys, being unwilling to pay the amount which the attorneys claimed for their compensation, and as a reference, to ascertain, by the taking of testimony, what amount was actually due, was had on his application, and a lengthened investigation had taken place before the referee, which in effect was the same as a trial would have been in an action brought by the Messrs. Bangs to recover for their services, and the referee having adjudicated upon the matter, and filed his report; which after exceptions taken to it, was confirmed upon the merits, I do not think that the applicant should then be allowed, as a matter of favor, to withdraw his application, and put his attorneys to the necessity of trying the whole matter over again in some other form of proceeding.

The judge below held, and as I think, correctly, that the applicant could not, after the reference had been entered into, withdraw his application, as a matter of right, and as the plaintiff was at liberty to give evidence, if he thought proper, after the Messrs. Bangs' testimony was closed, and as

Matter of Davis.

an offer was even made to him, after the filing of the report and the exceptions to it, to give testimony if he desired to do so, of which he did not avail himself, he should not be allowed to withdraw the proceeding after it had thus been brought to a termination as a matter of favor. The applicant argues that the withdrawal of such an application is analogous to the submission by a plaintiff to a non-suit. The only way in which a plaintiff could submit to a non-suit, if the court was not asked by his adversary to grant one, was by failing to answer, when he was called, upon the jury coming in to render their verdict. As the law formerly existed, the plaintiff had to be called before the jury could deliver their verdict, in order to answer the amercement to which, by the old law, he was liable in case he failed in his suit, as a punishment for a false claim (III Bl. Com. 276, 376; *Gale v. Hoystradt*, 7 Hill, 179; *Poucher v. Livingston*, 2 Wend. 296); and although the amercement by the crown, which was a very harsh proceeding, ceased in time to be exacted, the ancient forms of giving pledges, John Doe & Richard Roe, and of calling the plaintiff before the jury rendered their verdict, was adhered to; and if the plaintiff failed to answer, he was non-suited. This unnecessary procedure was abolished by the rules of the Supreme Court, in 1845, p. 24; which provided (and also Rule 38 of 1871) that it should not be necessary to call the plaintiff, and that he should have no right to submit to a non-suit after the jury had gone from the bar to consider of their verdict; and it was afterwards provided, that upon a hearing before a referee the plaintiff could not submit to a non-suit after the cause has been finally submitted to him (Rule 39 of 1871.) When the plaintiff, therefore, entered upon the trial before the court he could not, unless he was allowed by consent of parties and the court to withdraw a juror, submit to a non-suit; and unless the defendant asked for one, the cause had to go to the jury, and their verdict was a final adjudication of the matter put in issue by the action, and upon a hearing before a referee, it was equally final, after the case was submitted to him for decision (Rule 39 of 1871). There is no

Matter of Davis.

analogy, therefore, between the withdrawal of an application of this kind after it has been instituted and the voluntary submission to a non-suit.

In *Seaboard &c. R. R. Co. v. Ward*, (1 Abb. Pr. 47,) Mitchell, J. says; "The absolute right of a plaintiff to discontinue his action on payment of costs, at any time before judgment or decree, or before the case was submitted to the jury, has been the law both of this country and of England, from the earliest period." This is perhaps stated a little too broadly. It is said in Dunlap's Practice, p. 488, that "although a plaintiff might have a rule to discontinue, as a matter of course, *before* trial or inquiry, yet *afterwards*, he had to obtain permission from the court;" though he could, as I have said, until precluded by the rule above referred to, have submitted to a non-suit by failing to answer when called. The rule is more correctly stated by E. Darwin Smith, J., in *Young v. Bush* (36 How. Pr. 242). He says that the principle established by the cases, is; that the right to discontinue is not absolute; that it is to be exercised under the control of the court, and may be disallowed in the discretion of the court, or restricted upon equitable considerations; remarking further, that "the plaintiff should not be compelled to prosecute a suit if he wishes to put an end to it and to the litigation entirely; but where he has long litigated a question and put the defendant to much expense and trouble, and is substantially defeated in it, if he wishes to discontinue, it should be upon terms that he will not commence a new suit," an observation that applies pertinently to the present case.

The judgment of a court of competent jurisdiction upon a matter in issue before it, of which it has cognizance, is conclusive and cannot be attacked collaterally (*White v. Coatsworth*, 6 N. Y. 137; *Demarest v. Darg*, 32 N. Y. 281). This principle also applies to all questions that may be legitimately raised and tried in an action, whether incidentally or collaterally, for the purpose of the regular conduct or disposition of the cause. All persons appearing in a court of competent jurisdiction, either as parties, attorneys,

Matter of Davis.

or purchasers, and in any judgment entered therein or in any other manner properly intervening in furtherance of the cause, or the matters involved therein, subject themselves to the action of the court in the exercise of the jurisdiction legitimately conferred upon it. (*Requa v. Rea*, 2 Paige, 339; *Miller v. Collyer*, 36 Barb. 250; *Willette v. Van Alst*, 26 How. Pr. 325.) One who adopts the legal machinery of an action to obtain any relief or redress that might be afforded him therein, is bound by any judgment upon his claim, equally with any actual party to the action. All questions as to the respective rights of attorney and client in the conduct of the cause, and all claims between them as to retention or removal of the attorney and all rights of lien incident to those questions, and the extent of any such lien, come within the legitimate power of a court of record, as matters to be legitimately (though incidentally) adjudicated therein, when an appeal is made to the court for that purpose, during the pendency of the action. In view of this, and without inquiring farther as to what may be the effect of allowing this report and the order confirming it to stand;—it is sufficient to say that whatever rights the plaintiff's attorneys have derived, or may derive from it, they should not be deprived of them.

I think the order appealed from should be modified by striking out the portion appealed from, and that the report of the referee should, in all other respects, be confirmed, except that portion requiring the applicant to deposit the \$3,012 70, as security for the attorney's claim in the other suits.

ROBINSON, J., concurred.

Ordered accordingly.*

* No appeal was taken from this decision, and subsequently two suits in this court, brought by the attorneys against the applicant to recover for the same services of which evidence was given in this proceeding, came to trial before Judge VAN HORSSEN, and in both suits the referee's report as modified by the general term was (against objection) received as conclusive evidence of the amount due, and judgment was rendered accordingly, from which no appeal was taken.

Ayer v. Rushton.

JAMES C. AYER *et al.* Respondents, against FREDERICK V. RUSHTON, Appellant.

(Decided February 5th, 1877.)

Words in common use as descriptive of medicines for particular diseases, or which merely indicate by its common name an ingredient of a medicine, cannot be appropriated by a manufacturer of such medicine as a trade-mark, nor can a combination of such words be so appropriated. *Cuswell v. Davis*, 58 N. Y. 223, followed as controlling.

Plaintiffs invented and prepared a medicine for chest diseases to which they gave the name of "Cherry Pectoral," and which was extensively known and sold as "Ayer's Cherry Pectoral;" one of the ingredients was extract of wild cherry, and the word "pectoral" had been before the invention of plaintiffs' medicine, applied to medicines for chest diseases. Held, that the plaintiffs could not claim the exclusive use of the words "Cherry Pectoral" as a trade-mark.

APPEAL by the defendant from a judgment in favor of the plaintiffs, granting a perpetual injunction against manufacturing a compound called "cherry pectoral," and using that name upon bottles, labels, or wrappers, and selling any compound by that name, and against imitating the plaintiffs trade-mark "cherry pectoral." The defendants appealed upon the judgment roll including the findings of fact and law made at special term.

Everett P. Wheeler, for appellant.

John Sherwood, for respondents.

JOSEPH F. DALY, J.—The findings of the learned judge at special term that "the article put up, advertised and offered for sale and sold by defendant under the title and name "cherry pectoral" is well calculated to deceive and mislead purchasers and to induce them to believe that the said article of defendant is that of the plaintiffs:" and that "the defendant, with the wrongful intent to induce purchasers to believe

Ayer v. Rushton.

that the article sold by him was the same as that of the plaintiffs, and with the wrongful intention of securing to himself the benefit of the plaintiffs' trade-mark, has imitated the trade-mark of the plaintiffs so closely as to mislead and deceive purchasers;" and that "the use by defendant of the words name and title "Cherry Pectoral" is a wrongful and unlawful imitation of the words, name and title "Ayer's Cherry Pectoral," the plaintiffs' trade-mark: are not, in my opinion, sustained by the sixth and ninth findings in which the several compounds, packages, labels and wrappers of the plaintiffs' and defendant's preparations are set forth and in which the defendant's acts in presenting his compound to the public and endeavoring to make sales of it, are minutely described. From these findings it appears that both preparations are nearly alike in color, taste and smell, although defendant has lately altered his compound slightly, in these particulars; that they are both put up in oblong flat clear glass bottles; that plaintiffs' bottles contain about six ounces and defendant's about five and a half ounces; that plaintiffs' bottles are stamped "Ayer's Cherry Pectoral," and defendant's (I assume in the absence of any finding on that point) are not stamped; that plaintiffs' bottles are in a paper wrapper of a deep orange color, and defendant's bottles in a white paper wrapper; that plaintiffs' wrapper bears the printed words (the color of the ink not specified in the finding) "Ayer's Cherry Pectoral for the various affections of the lungs and throat, such as Colds, Coughs, Croup, Asthma, Influenza, Hoarseness, Bronchitis, and incipient consumption, and for the relief of consumptive patients in advanced stages of the disease. Prepared and sold by J. C. Ayer, Lowell, Massachusetts. Price one dollar;" and defendant's wrappers bear the words, printed in red ink, "Cherry Pectoral, Rushton, F. V." and upon an inside wrapper "Cherry Pectoral," and after some printed words of description and recommendation the words, "For Sale wholesale and retail by Rushton & Co., 11 Barclay street, New York, formerly of No. 11 Astor House;" that defendants advertised by posters, placards and signs the words "Cherry Pectoral," for sale at 11

Ayer v. Rushton.

Barclay street, and placed signs in front of his store with the words "Depot of the Cherry Pectoral Company" thereon; that he conspicuously placed in his store a placard with the words "Ayer's Cherry Pectoral, one dollar. Rushton's Cherry Pectoral, fifty cents, which will you have?" that he instructed his clerks to answer to purchasers who called for Ayer's Cherry Pectoral that his Cherry Pectoral was not Ayer's, and to ask persons inquiring for Cherry Pectoral which they wanted, Rushton's or Ayer's, and to say that Rushton's was much better; that bottles containing said preparations are almost uniformly sold in closed opaque paper wrappers.

We have then, the undisputed circumstances that defendant has been careful to distinguish his preparation from plaintiffs', by a marked difference in the color of the wrappers, the lettering and the arrangement of the words printed on the wrapper, and by distinctive announcements, the signs in his store and through his clerks. In fact he seems to have taken precautions to prevent the two compounds from being confounded in the eyes of purchasers; and to prevent purchasers being misled or deceived into buying his medicine under the impression that it was plaintiffs' medicine.

Defendant certainly did take advantage of the celebrity of plaintiffs' preparation to which the name of "Cherry Pectoral" seems, from the findings, to have been exclusively applied in the trade, in the last thirty years or more, to gain a readier market for a preparation of his own which he called "Cherry Pectoral." Whatever popularity Ayer's Cherry Pectoral had acquired as a medicine for throat and lung affections, he hoped to gain advantage from, by calling his medicine a Cherry Pectoral, thus inducing persons to try his compound, if they could be persuaded that one Cherry Pectoral was as good as another. To this extent, and a very great extent it is no doubt, defendant proposed to build up a business upon and avail himself of, the fame which years of sale and a great expenditure of money for advertising on the part of plaintiffs and their predecessors had acquired for the well-known preparation they manufactured, but there is clear

Ayer v. Rushton.

proof that he did not intend to incur any penalties for imitation of devices, labels, or marks, or for attempts to impose his compound upon the public as the article plaintiffs' manufactured. He kept within the letter of the law, if he were at liberty to call his preparation "Cherry Pectoral."

It appears from the findings, that Ayer's Cherry Pectoral is a medicine for the relief and cure of affections and diseases of the lungs and throat, of which medicine the extract of wild cherry is one of the beneficial ingredients. The word "cherry" describes, therefore, one of the ingredients of the compound, and the word "pectoral" describes the use and application of the medicine. The findings show that "pectoral," as an adjective referring to medicine for the throat and lungs, was known to scientific men, and was found in books of surgery, &c., before plaintiffs' compound was invented; and that medicines for the throat and lungs called "Pectoral Syrup," and "Pectoral Wine," appear in medical books prior to the plaintiffs' use of the word; that a medicine called "Britton's Pectoral Syrup" had been made and sold in Northamptonshire, England, before that time; that in dictionaries published before plaintiffs' manufacture of "Cherry Pectoral," began in 1842, and of standard dictionaries of the English language, show that the word "pectoral," as a noun, as well as an adjective, was and is a common established word in the language signifying a medicine for coughs, for the stomach and lungs, for the breast and for diseases of the breast. (Johnson's Dict. (Ed. 1799); Dunglison's Med. Dict. (Tit. "Pectorals"); Ree's Cyclopædia; Richardson's Dict.; Blunt's (1681); Philips' "New World of Words"; Glossographia Anglicana (1707); Cole's Dict. (1717); Kersey's Eng. Dict. (1721); Bailey's Dict. (1763); Johnson (1763); Ash (1765); Allison (1813); Worcester.) The word "pectoral," therefore, is common property, as descriptive of a medicine for diseases of the chest, breast, lungs and throat, and no person can acquire an exclusive right to its use in that sense. The word "cherry," indicating an ingredient, or the sole or chief ingredient, as an extract or tincture of wild cherry in a medi-

Allen v. James.

cine, cannot become the exclusive property of any person, to describe the medicine in the compounding of which it is used. The same must of course be said of a descriptive term made up of the two words "cherry" and "pectoral," used to describe the ingredients and use of the compound.

The late case of *Caswell v. Davis* (58 N. Y. 223) is controlling as a decision directly in point.

No attempt is made by defendant to infringe plaintiffs' trade-mark in the name of "Ayer," in which they have an exclusive property, and the injunction prayed for against the use of the name "Cherry Pectoral" should have been denied.

VAN HOESEN, J., concurred.

Judgment reversed, and new trial ordered costs to abide event.

WILLIAM H. ALLEN, Respondent, *against* EDWARD D. JAMES *et al.* Appellants.

(Decided February 5th, 1877.)

It is error to admit parol evidence of matters appearing of record to show that a title to land is defective, and in a case where the introduction of such evidence tends to discredit with the jury the testimony for the party objecting, such error is not cured by charging the jury to disregard such evidence.

Evidence that the title to land is defective, is not relevant in an action by a broker for services in procuring a purchaser for the land where the issue is whether or not the broker was employed, and where it is not disputed that the purchaser procured by the broker, entered into a contract for the purchase of the land.

APPEAL by the defendants from a judgment entered upon the verdict of a jury and from an order made denying a motion for a new trial.

The action was brought to recover commissions for effecting the sale of real estate. The complaint alleged that the

Allen v. James.

defendants employed the plaintiff to obtain for them a purchaser of certain land ; that the plaintiff procured a purchaser who made a contract with the defendants for the purchase of the land.

The answer contained a general denial and also an allegation that the purchaser failed to fulfill his contract.

On the trial the plaintiff was allowed, under the defendants' objection, to show by parol evidence, to wit, the testimony of the lawyer who searched the title for the purchaser, —that there were defects in the title appearing of record. In the charge, the jury were instructed to disregard this evidence.

E. H. Benn, for appellants.

F. Smyth, for respondent.

ROBINSON, J.—The claim of a real estate broker to his commission for effecting a sale (in the absence of any other controlling circumstance), accrues when the purchaser whom he has procured has entered into an agreement with his employer for the purchase and sale of the property. The contract of employment of the plaintiff by the defendants as declared in his complaint and testified to on his behalf (subject to the consideration hereafter stated, relating to Mrs. James,) became perfect upon the execution of the contract with Burchell, the purchaser. The testimony offered on the part of the defendant was in denial of any such employment, and of a mere gratuitous promise by the defendant, E. D. James, after the contract was executed, that if the purchase was completed by Burchell he would pay to plaintiff a commission of one per cent ; that he told plaintiff originally that he would pay no commission. He was agent for his wife in relation to her real estate ; made sales and purchases for her, and she was willing to sell on the terms of the contract. It also appeared that Mrs. James signed the contract in conjunction with her husband when brought to her by the plaintiff, who then told her he was a real estate broker. The

plaintiff was allowed in the trial to prove by John R. Flanagan, Esq., who had searched the title for Burchell, the purchaser, and against the objection of the defendants as to relevancy and competency as parol testimony, what were the defects and objections appearing of record against defendants' title by way of mortgages, *lis pendens*, &c. In view of the fact, that the issue was as to plaintiff's employment upon the contract or terms stated in the complaint, all this testimony as to defects discovered by the purchaser in the title which defendants had agreed to convey to him, was irrelevant, and proof of such defects as appeared of record by parol testimony incompetent. The subsequent intimation by the judge to the jury to disregard it, did not cure the difficulty. (*Erben v. Lorillard*, 19 N. Y. 303; *Neuman v. Goddard*, 48 How. Pr. 363.) It is only in cases where the appellate court can plainly see that the testimony, improperly admitted, could have had no weight with the jury, that the objection can be overcome. The aspect presented of defendants contracting to sell property to which they had no valid title, could not but have had its weight in influencing the jury which side to credit, in the conflict of testimony.

In addition to this, there certainly was no competent evidence of plaintiff's employment by the defendant, Sarah James. Her co-defendant was her agent to effect sales of her real estate. The employment of a sub-agent or broker is not shown to have been necessary or recognized as usual by any well-established custom, and plaintiff's mere suggestion to her when he called and procured her signature to and execution of the contract of sale, that he was a real estate broker, conveyed no intimation that he had been acting in that capacity for her, on employment through her husband upon her credit and responsibility. (*Jones v. Walker*, 63 N. Y. 612.) The judgment should be reversed, a new trial ordered with costs to abide the event.

CHARLES P. DALY, Chief Justice.—I agree that there must be a new trial for allowing the plaintiff to show under the defendants' objection, by parol, defects and objections to

Battersby v. The Mayor, etc. of the City of New York.

the plaintiff's title appearing of record, and that the error was not cured by the judge telling the jury in his charge that they had better throw that out of the case; that the invalidity of a title could not be proved by the opinion of a lawyer; but that record evidence should have been offered. We cannot say that this testimony could have no weight with the jury, but on the contrary they may have believed from it that James was attempting to sell property to which his wife had no title, and as Judge Robinson suggests, such a circumstance may have influenced them to believe the plaintiff instead of James, as respects the terms of plaintiff's employment, in which they were directly in conflict. But I am not prepared to go farther than this; and as there must be a new trial for this reason, it would not be material to state my views upon the question of agency and the evidence respecting it.

LARREMORE, J., concurred.

Judgment reversed and new trial ordered.

JENYNS C. BATTERSBY, Appellant, *against* THE MAYOR,
ALDERMEN AND COMMONALTY OF THE CITY OF NEW
YORK, Respondent.

(Decided February 5th, 1877.)

The duty of the corporation of the city of New York to keep the streets of the city free from snow and ice is not absolute and unqualified, and where an unusually large fall of snow occurs, the corporation will not, if it exercise reasonable diligence in removing it, be held liable where an accident occurs by reason of snow or ice not yet removed.

Where it appeared by the plaintiff's evidence that he had, in crossing a street in the city of New York, stepped upon a pile of mud, and had fallen, his foot slipping upon some slippery substance, supposed to have been ice, and it also appeared that the snow had fallen in unusually large quantities in the winter when the

Battersby v. The Mayor, etc. of the City of New York.

accident occurred; that there had been a very large snow-storm a few days before the accident, and also that during that winter the corporation had employed men almost every other day in cleaning the street: *Held*, that this evidence failed to show a case of negligence for which the city was responsible.

EXCEPTIONS ordered to be heard in the first instance at general term to a direction of Judge VAN BRUNT at trial term, dismissing the complaint.

The action was brought to recover damages for personal injuries suffered by the plaintiff in falling while crossing Nassau street in the city of New York, which fall it was alleged, resulted from the plaintiff's slipping on some ice which, by the defendant's negligence, had been allowed to remain in the street.

The complaint was dismissed on the ground that no notice to the defendant of the condition of the street had been shown.

Chauncey Shaffer, and *W. C. Reddy*, for appellant.

W. C. Whitney, for respondent.

CHARLES P. DALY, Chief Justice.—The exceptions should be overruled. All that is shown by the plaintiff's own testimony is that he was crossing from the easterly to the westerly side of Nassau street, about four o'clock in the afternoon of March 11, 1875, and when he got to the middle of the street, he put his foot on a pile of mud and his foot sunk in the mud, and slipped from under him, when he fell, breaking the outer bone of his leg, a short distance from the ankle joint. He thought that there was ice under the mud, and that it had melted a little or slowly by the warmth of the mud, but he did not see the ice; and even if he had, it would have made no difference. It was one of those ordinary accidents that may occur to any one in the streets, in winter, and for which no one is responsible. It appeared from the evidence, that in the winter of 1875, there was more than the usual number of snow-storms; and more snow than during any winter of late years; that every-

Vol. VII.—2

Battersby v. The Mayor, etc. of the City of New York.

where on all the streets, there was a considerable accumulation of snow and ice; and that three or four days before the accident, there had been a severe snow-storm.

To hold that the city authorities must, under all circumstances and at all times keep the street clear of any snow, ice or mud, would be unreasonable, especially in winters like this and the preceding one, where, through the constant occurrence of snow-storms, the streets of the city are in the condition that this street was in at the time of the accident. The evidence shows that there was a reasonable amount of vigilance shown on the part of the city authorities; that this street—Nassau street—had sometimes been cleaned entirely off; that every other day there were cleaners in it; and that the snow was taken off and around this crossing; that men were engaged cutting the ice and sweeping the street; that on the day in question, it was full of ice and slush about the crossing, or as another witness expresses it, "there was mud and slop in the street; it was a slippery day and there were lumps of ice in the street." In the neighborhood of this crossing it was in a bad condition, but the witness did not know how long. It appears further, as I have said, that there was a fall of snow a few days previous to the accident, and that persons were then employed cleaning the street, and that every other day persons were so engaged.

I do not think that the evidence was such as would justify a jury in finding that the plaintiff's accident was due solely to the negligence on the part of the defendant, and I think the motion to dismiss the complaint was properly granted.

ROBINSON and LARREMORE, JJ., concurred.

Exceptions overruled.

Heydecker v. Lombard.

CHRISTIAN HEYDECKER, Appellant, *against* JOSIAH LOMBARD *et al.* Respondent.

(Decided February 5th, 1877.)

Where the defendants agreed to sell and deliver to the plaintiff oil of a specified quality, and in fulfillment of that contract tendered certain oil which the plaintiff, after an actual inspection and examination of it, accepted and shipped to Havre, where a certain portion of it was discovered to be of an inferior quality, but the plaintiff did not offer to return any of it to the defendants but sold the entire quantity and received the proceeds: *Held* (following *Reed v. Randall*, 29 N. Y. 358), that the plaintiff could not make any claim for damages on account of the inferior quality of the oil.

Where the plaintiff, upon discovering that certain oil that had been delivered to him under an executory contract of sale, was of a quality inferior to that called for by the contract, notified the defendants of the fact and asked them for directions about it and was told to do every thing that the claim might be well established against whom it might concern: *Held*, that this did not amount to an offer to return the oil and a refusal to accept it.

APPEAL by the plaintiff from a judgment of this court entered on the report of Livingston K. Miller, Esq., as referee to hear and determine the issues.

The action was brought to recover damages for the failure of the defendants to deliver to the plaintiff crude petroleum of the quality called for by the contract for the sale thereof made by the defendants.

The contract of sale was made through brokers and evidenced, as against the defendants, by a bought note in the following form:

NEW YORK, Oct. 10th, 1867.

Bought for account of Mr. Christian Heydecker, of Messrs. Lombard, Stevens & Co. (about), three thousand (3,000) barrels crude petroleum, free from water and sediment; gravity 40° at 47°, at twenty-one (21) cents per gallon, cash, packages included, deliverable in prime shipping order free to vessel loading at Venango or Red Hook yards, as sellers may direct. Delivery to be completed within twenty (20) days, none to be delivered sooner than five days. * * *

Taft, Lee & Co., Brokers.

(Written across the face)—Accepted.—Lombard, Stevens & Co.

Heydecker v. Lombard.

The complaint alleged that of 2,993 barrels of petroleum delivered to the plaintiff by the defendants under this contract, 1,000 barrels were not of the quality called for thereby, and that in consequence thereof (the plaintiff having paid the full purchase price) he had been damaged in the sum of \$10,000.

The complaint also alleged that upon discovering the inferior quality of the oil the plaintiff had tendered it back to the defendants, who had refused to accept it. The evidence upon the question of the offer to return is stated in the opinion.

The answer admitted the making of the contract by the defendants and the delivery of the oil thereunder, and alleged that the plaintiff, with full and fair opportunity for inspection, and after actual examination and inspection, had received and accepted it under the contract without objection. The answer also denied that any of the oil delivered was of a quality inferior to that called for by the contract, and denied that there had been any offer to return.

The referee in the opinion accompanying his report based his decision upon the fact that the plaintiff had accepted the oil after an actual inspection and examination of it by an inspector appointed by him, and that there was no evidence from which any inference could be drawn that the defendants after this inspection had substituted other oil in the place of that so inspected.

Alfred Dickinson, for appellant.

Joseph H. Choate, for respondents.

LARREMORE, J.—On Oct. 10, 1867, the parties entered into an executory contract for the purchase and sale of 3,000 barrels of crude petroleum, as per broker's memorandum of sale. Of this quantity 1,000 barrels had been purchased by the defendants from the Sterling Oil Works, in order to complete the contract. After an inspection made by plaintiff's agent of all the oil, it was delivered, accepted

Heydecker v. Lombard.

and paid for. Plaintiff shipped it to Havre where, after further inspection, the 1,000 barrels that had come from the Sterling Oil Works was alleged to be of a quality inferior to that called for by the contract, was sold at a diminished price, and the plaintiff sues for the difference in value. The case was referred and tried. The referee found in favor of the defendants and plaintiff appeals.

There was no warranty on the sale, and plaintiff should have offered to return the oil before bringing suit (*Reed v. Randall*, 29 N. Y. 358).

The testimony is not sufficient to sustain an offer to return and a refusal to accept. Plaintiff testified that he told Lombard the news from Havre about the oil, and asked his directions in the premises; that Lombard answered, "Tell them or write to them to do everything legally, in order that the claim may be well established against whom it may concern." Lombard testified, "I told him if I was in his place I would have the matter put in such a shape that the evidence would be legal. That was the best advice I could give him. He asked what directions he should give to Havre; to that I answered I had nothing to do; I did not tell him what to do." Nor is the testimony sufficient to sustain the special agreement set forth in the complaint that defendants would indemnify plaintiff and pay him for any loss sustained. On the contrary, the only agreement proved was that of Oct. 10, 1867.

From the alleged fact that the oil, after its transportation to Havre, was inferior in quality to that inspected and accepted by the plaintiff, he asks the court to infer that defendants are chargeable with a fraud in substituting other oil in place of that inspected. Upon the question of quality the testimony was conflicting, and the referee has found in favor of the defendants. The judgment appealed from should be affirmed.

CHARLES P. DALY, Ch. J., and ROBINSON, J., concurred.

Judgment affirmed.

Matter of Rice.

IN THE MATTER OF THE APPLICATION OF ISAAC S. RICE
TO BE ADMITTED AS A CITIZEN OF THE UNITED
STATES.

[SPECIAL TERM.]

(Decided October 8th, 1875.)

Where a minor residing with his parents in this country was sent by them to a foreign country to be educated, and after having there completed a course of study and before the end of his minority, returned and again resided with his parents here: *Held*, that by going to a foreign country for such a purpose he did not change his residence, and that the years spent by him in such foreign country were to be computed as years of residence here in determining whether he was entitled to be admitted as a citizen of the United States.

ONE Isaac S. Rice applied to this court to be naturalized and by an affidavit attached to his application showed that he was born in Germany in the year 1850, and came to New York when he was only six years old, in 1856, in company with his parents, with whom he resided until he was sixteen years old, when, under their direction, he returned to Germany for the purpose of completing his education; that he remained in Germany for three years, when, having completed his course of study, he returned to his parents in this city, with whom he had since resided.

He furthermore averred that, from the time that he was capable of forming an opinion or desire on the subject, it was always his intention to become a citizen of the United States.

ROBINSON, J.—The domicile of the applicant, from 1856 to 1866, when living with his parents, in this city, was the same as theirs. (Story on Conflict of Laws, § 46; *Sprague v. Lithberry*, 4 McLean, 442.)

Being sent by them to Germany when sixteen years of age for a temporary purpose—to wit, to acquire an education—the residence of his parents not being changed, and no

People v. Wissig.

intention being entertained, on his or their part, on his being sent or during his stay there, that he should remain in Germany or separate himself from his family; his residence continued to be that of his parents.

Our Election laws (2 R. S. [Edm. ed.] 128) enact that "No person shall be deemed to have lost or acquired a residence by being a student in a college, academy or seminary of learning;" and although this provision relates rather to the rights of electors under the State laws, than to the right of naturalization under the Federal laws, it is but a recognition or affirmance of the rule at common law.

I am of opinion that the applicant "has resided five years within the United States, including the three years of his minority," and that his application should be granted, notwithstanding such temporary absence.

THE PEOPLE OF THE STATE OF NEW YORK *against* MARY
WISSIG, Principal, AND JOHN NIMPHIUS, Surety.

The judgment entered on a forfeited recognizance will be vacated where, after the forfeiture of the recognizance, the surety has been prevented from retaking and surrendering his principal by the death of the principal; upon the usual terms of payment of any costs that may have been incurred by the People in entering the judgment.

APPLICATION at general term to vacate a judgment entered on a forfeited recognizance. The facts are fully stated in the opinion.

James C. Anderson, for the surety Nimphius.

Benjamin K. Phelps, District Attorney, for the People.

BY THE COURT, CHARLES P. DALY, Chief Justice.—If after the forfeiture of the recognizance, the bail should take the prisoner and surrender him into the custody of the law,

Lentze v. Butterfield.

the surety upon the conviction or acquittal of the prisoner, would be discharged from the forfeiture, after the payment of whatever costs or expenses may have been incurred by the entering up of the judgment.

In this case it is not in the power of the surety now to take and surrender the prisoner. After the forfeiture he surrendered her, he says, into the hands of the District Attorney through her counsel, Howe & Hummell, and, upon being informed that upon the payment of twenty dollars the judgment would be cancelled she, he says, gave Howe & Hummell the twenty dollars. However this may be, it appears that she was afterwards arrested for a larceny in New Jersey, pleaded guilty, but sentence was suspended on payment of costs, and she was discharged from custody; that afterwards, on the 1st of October, 1874, at Brown's crossing, in Steuben County in this State, she leaped from a railroad car whilst it was in rapid motion and was killed. Under these circumstances we think the judgment against the surety should be discharged. It is no longer in the power of the law to punish her, assuming her to have been guilty of the offence charged, and we do not see that the ends of justice would in any way be served by requiring the surety to pay twenty-five hundred dollars, the pecuniary amount of the penalty for which he became bound. We think the judgment should be discharged upon the payment of any costs that may have been incurred, by entering it up.

TREVOR C. LEUTZE, Respondent, *against* WILLIAM BUTTERFIELD, Appellant.

(Decided February 5th, 1877.)

Under the act of Congress of March 3d, 1875, which provides that any suit of a civil nature at law or in equity, now pending or hereafter brought in any State court, when the matter in dispute exceeds \$500 and in which there shall be a con-

Leutze v. Butterfield.

troverſy between citizens of different States, may be removed by either party into the Circuit Court of the United States for the proper diſtrict,—*Held*, that the defendant could remove a ſuit in this court for a balance of account brought againſt him by an aſſignee of it, who was a citizen of a different State, though his aſſignor in whoſe favor the debt was contracted was a citizen of the ſame State as the defendant.

Congreſs, by the act of 1875, in changing the rule in this reſpect, but exerciſed within conſtitutional limits the power conferred on it by the Conſtitution. Per ROBINSON, J. Where a caſe is within the provisions of the act of 1875, providing for a removal of a ſuit from a State to a Federal court, and a party has complied with all the requirements of the act to effect ſuch removal, if the ſuit is thereafter proceeded with in the State court, ſuch proceedings are *coram non judice*, and the judgment entered therein will, on an appeal by the party ſeeking the removal, be reversed.

APPEAL by the defendant from a judgment of this court entered on the report of a referee.

The plaintiff, a citizen of New York, ſued the defendant, a citizen of Maſſachuſetts, for a balance of account alleged to be due the plaintiff's aſſignor. The defendant entered his appearance in the action and filed his petition and bond for the removal of the cauſe to the Circuit Court of the United States for the Southern Diſtrict of New York in purſuance of the act of Congreſs of March 3d, 1875. The claim in diſpute was aſſigned to the plaintiff by one Henry E. Townſend, a citizen of Maſſachuſetts. The application by the defendant to this court for an order removing the action to the United States court was denied, and the cauſe was tried by a referee and judgment rendered for plaintiff, from which defendant appealed.

John Henry Hull, for appellant.

Edward D. McCarthy, for reſpondent.

LARREMORE, J.—The proceedings by the defendant to remove the action were proved on the trial and an exception taken to the reſuſal of the referee to find that this court had no juriſdiction in the premiſes.

The firſt queſtion for conſideration is neceſſarily that of juriſdiction. Is this court the proper tribunal for the adju-

Leutze v. Butterfield.

cation of the rights of the parties? This depends upon the construction given to the act of Congress passed March 3d, 1875 (U. S. Statutes, 1875, ch. 137), entitled "An act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from State courts and for other purposes."

This act repeals all parts of previous acts inconsistent with or repugnant thereto, and if defendant has complied with its provisions, then the trial of this action by the referee, and all proceedings subsequent thereto, were *coram non judice*.

By this act (§ 1) the Circuit Court is given original cognizance of all suits of a civil nature when the matter in dispute exceeds \$500, in which there shall be a controversy between citizens of different States, &c., but said court does not have cognizance of any suit founded on contract in favor of an assignee unless such suit might have been prosecuted in said court if no assignment had been made except in cases of negotiable paper.

Section 2 provides that any suit of a civil nature at law or in equity now pending or hereafter brought in any State court when the matter in dispute exceeds \$500, and in which there shall be a controversy between citizens of different States, may be removed by either party into the Circuit Court of the United States for the proper district.

It is conceded that plaintiff could not have commenced this action in the Circuit Court, for as assignee of a claim other than negotiable paper the limitation of § 1 would apply, and the court could not have cognizance of any such suit.

Is this limitation applicable to actions sought to be removed from the State courts? The learned judge who denied the application for removal held the affirmative of this proposition. (Abbott's New Cases, vol. 1, p. 18.)

The intention of the federal legislature in this respect is not clearly expressed in the act itself. But § 2 gives a defendant the right to remove *any* suit without distinction as to the character in which the plaintiff sues except that the parties to the controversy must be citizens of different States.

The defendant was entitled as a matter of right to a

change of forum (*Stevens v. Phoenix Ins. Co.* 41 N. Y. 149; *Holden v. Putnam Fire Ins. Co.* 46 N. Y. 1; *Ayres v. Western R. R. Co.* 45 N. Y. 260; *Bell v. Dix*, 49 N. Y. 232; *Kanouse v. Martin*, 15 How. U. S. 198; *Gordon v. Longest* 16 Peters, 104), unless such right is controlled by the limitation above referred to, and that question should have been raised and decided in the Circuit Court (*Bell v. Dix*, *supra*; *Gaines v. Fuentes*, 92 U. S. [2 Otto] 10).

It involves the construction of a statute of the United States as to the jurisdiction of a federal court, and should have been referred to that tribunal for adjudication. Defendant's application met all the requirements of the act of March 3d, 1875, and a stay was thus imposed upon all further proceedings in this court. The defendant might have availed himself of the authority and direction of the substituted tribunal at an earlier stage of the action, and thus have avoided the expense and delay of a fruitless litigation, but the cases above cited hold that the proceedings in this court are not a waiver of the objection to jurisdiction.

The judgment appealed from should be reversed.

ROBINSON, J.—The eleventh section of the Judiciary Act of Congress, passed September 24, 1789, conferred original jurisdiction on Circuit Courts, of all suits of a civil nature, when the matter in dispute, exclusive of costs, exceed the sum or value of five hundred dollars, and an alien was a party or the suit was between a citizen of the State wherein it was brought and a citizen of another State, provided that no Circuit Court shall have cognizance "of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless a suit may have been prosecuted in such court to recover the said contents if no assignment had been made, except in case of foreign bills of exchange;" and section twelve of the same act authorized any suit commenced in any State court against an alien or citizen of another State, when the amount in dispute exclusive of costs exceeded the sum or value of five hundred dollars, to be removed by the defendant to the Circuit Court in the manner

Leutze v. Butterfield.

there provided. The act of July 27, 1866 (14 U.S. Stat. at Large 306), extended the privilege of removal in certain cases to aliens and citizens of another State joined as defendants with other defendants not entitled to its benefits, and this privilege was further extended by the act of March 2, 1867, under other certain circumstances, to cases where either a plaintiff or defendant was a citizen of another State than that of the other party, and made oath that he could not have a fair trial on account of local prejudice or influence. In *Bushnell v. Kennedy* (9 Wall, 387) the Supreme Court of the United States held that the restriction in section eleven of the act of 1789, against a Circuit Court taking cognizance of a suit instituted on behalf of an assignee unless it might, without such assignment, have been brought therein by the assignor, did not apply to a case removed into the Circuit Court by a defendant who was an alien or citizen of another State, although the plaintiff, the assignee of the cause of action, could not have brought the action in the Circuit Court.

In *Ayres v. The Western Railroad Co.* (45 N. Y. 264), the Court of Appeals recognize the same principle, that the proviso or prohibition of the eleventh section not being found in the twelfth, and the reason for it not existing, the defendant's right of removal (the other circumstances concurring) was complete. In *Barclay v. Levee Commissioners* (1 Woods' R. [5th Circuit R.] 254), it was held that the provisions of the act of 1867, for the removal of causes from the State court, overrode the limitation in the eleventh section of the act of 1789, declaring that the Circuit Court should not have cognizance of actions on choses in action (except foreign bills) brought by an assignee, unless they might have been maintained by the assignor, if no assignment had been made.

An examination of the act of Congress of March 3d, 1875, which presents the question of jurisdiction raised by the defendant in this case, shows that the first section is but a substantial re-enactment of the eleventh section of the act of 1789 as above recited, and has reference solely to cases of *original* cognizance by Circuit Courts, and that section two is in principle but a brief embodiment of the right of removal

Leutze v. Butterfield.

conferred by the acts of 1789, 1866 and 1867, with such further rights in that respect as the Constitution justified Congress in conferring upon the federal courts in respect to controversies between citizens and aliens, and between citizens of different States. While the acts of 1789 and 1866 limited such right of removal to defendants, that of 1867 also conferred it upon plaintiffs, in special cases, and the Act of 1875 in enacting that any suit of a civil nature then pending or thereafter to be brought in a State court in which there was a controversy between citizens of different States, might be removed by either party into the Circuit Court of the proper district, but extended within constitutional limits the right conferred on Congress in that respect by the Constitution. The principles decided in the cases above referred to, in the United States court and in our Court of Appeals, are plainly applicable to and control the construction of the second section of the act of 1875.

The right of the defendant to a removal of the present action to the Circuit Court of the district seems to have been perfect, although the suit may have been one by plaintiff as assignee of a chose in action, in respect to which no suit could have been maintained in the Circuit Court by his assignor if no assignment had been made. He had complied with all the requirements of the act to effect such removal, and the case was one within the provisions of the act. Thereafter all proceedings in this court were *coram non judice*. (*Fisk v. Union Pacific R. R. Co.* 10 Abb. Pr. [N. S.] 457; *Stevens v. Phœnix Fire Ins. Co.* 41 N. Y. 149; *Holden v. Putnam Fire Ins. Co.* 46 N. Y. 1; *Taylor v. Shew*, 54 N. Y. 75.)

The judgment should for this reason be reversed.

CHARLES P. DALY, Chief Justice.—I concur in the construction given to the act of 1875 and that the judgment should be reversed.

Judgment reversed.

Abham v. Boyd.

GEORGE ABHAM, Respondent, *against* ROBERT BOYD,
Appellant.

(Decided February 5th, 1877.)

In proceedings to enforce mechanics' liens, a sub-contractor is not estopped from asserting his lien as against the owner by reason of the fact that the owner was induced to employ a certain contractor to build, by parol statements of such sub-contractor, that the contractor was responsible, and that if he was employed, he, the sub-contractor, would be responsible that the contractor would so perform his contract that no liens would be filed, such agreement being void, not being, under the Statute, in writing and there being nothing in it that operated by way of estoppel.

APPEAL from an order made at special term by Judge LOEW, denying a motion made by the defendant, Boyd, for leave to amend his answer.

This proceeding was commenced by Abham and others to foreclose a mechanic's lien on premises in the city of New York, but they failed to proceed with the proceedings and issues were joined between Stone, a defendant, sub-contractor and lienor, and Boyd, another defendant and owner of the premises. Boyd moved for leave to amend his answer by setting up as a defence to the lien of Stone that Boyd was induced by the representations of Stone to contract for building with Ward, another defendant and contractor; that Stone represented that Ward was responsible; that if Ward was employed he, Stone, would be responsible that Ward would perform the contract, and in such a manner that there would be no liens filed against the premises, and it was from the order denying this motion that this appeal was taken.

James W. Culver, for appellant Boyd.

E. J. Spink, for respondent Stone.

ROBINSON, J.—This is an appeal from an order denying the defendant Boyd the privilege of amending his answer by putting in an additional defense. The denial of the motion was justified by the long delay that had occurred since

the joining of the issue (in 1871) and also by the lapse of time since the alleged representations of Leander Stone were claimed to have been made and when the recollection of the precise words used must in a great measure have escaped the memory. But there is no substantial defense set out in the supposed amendment, which seeks to have Leander Stone adjudged to have been estopped from asserting the lien he set up in the action, by reason of such representations. The action was instituted by other lienors to foreclose mechanics' liens claimed to have been imposed on the property of the defendant Boyd, who had contracted with the defendant William Ward, for the erection of buildings upon the premises. The lien of Stone is as a sub-contractor for materials supplied to Ward and used in the building. The matter alleged by this amended answer, and which is supposed to constitute a defense against his claim, is that when Boyd the owner was negotiating with Ward for the contract, he was referred by Ward to Stone as to his character and responsibility, and "as a proper person to make an agreement for (building) the houses, and to make a contract to do so;" that in response to such inquiry said Stone said he was well acquainted with Ward; that Ward was a proper responsible person as a builder to construct said building, and also said and represented to said Boyd, for the purpose of inducing him to make such contract with Ward, that he said Stone would be responsible for the performance of the contract, and that said Ward should discharge said obligation and build said houses, so that no bills should be made to charge said building with liens, and that no liens should be allowed to be filed against said building, if he Boyd would let the said work to said Ward. That relying wholly on said representation he did so make the contract with Ward.

There is no allegation that all such representations as to Ward's character and responsibility were not true, and Stone incurred no legal responsibility to keep the premises free from liens, as any such an obligation to be binding must have been in writing. Nor does there exist any principle in equity or good faith which debars Mr. Stone from asserting any

Abham v. Boyd.

lien he may have for the materials supplied to Ward. This suit, and all proceeding under it are of no avail, if Boyd, the owner, has promptly paid Ward what became due under the contract. The lien of sub-contractors are of no efficacy except by way of subrogation to some such indebtedness of Boyd to Ward. The principle of an estoppel, is where a statement is made by a party intended to influence the conduct of the person with whom he is dealing, and thereby actually leads him into a line of conduct which must be prejudicial to his interests, unless the person so making the statement or admission be cut off from the power of retraction. (*Dezell v. Odell*, 3 Hill, 215; *Thorn v. Bell*, Hill & D. Supp. 430.) To warrant the doctrine of equitable estoppel there must generally be some intended deception, or such gross neglect on the part of the party sought to be estopped, as would constitute a *constructive fraud* on the person misled to his injury. (Story Eq. Jur. § 391; *Henshaw v. Bissell*, 18 Wall. 271; *Zuchtman v. Roberts*, 109 Mass. 53.) There is no suggestion contained in the proposed pleading that Mr. Stone made the assurance that the buildings should be kept from liens with any designed or ulterior purpose of availing himself of any misapprehension created by his verbal promise. There is no breach of good faith or fair dealing in Mr. Stone's pursuing the course he has taken to compel Mr. Boyd to pay to him money due on the contract to Ward, and to which as a sub-contractor he is legally subrogated to the extent of his lien.

The order appealed from should be affirmed with costs.

CHARLES P. DALY, Ch. J., concurred.

Order affirmed with costs.

Palmer v. Lang.

JOHN H. PALMER, Respondent, *against* PETER LANG,
Appellant.

(Decided February 5th, 1877.)

In an action for slander the defendant may show in mitigation of damages that the slanderous words complained of were spoken by him in the heat of passion, occasioned by recent conduct of a provoking character on the part of the plaintiff, and therefore *Held*, that in mitigation of damages for having called the plaintiff a thief and a scoundrel ; with having made false entries in the defendant's books, and having sold goods for the defendant and collected more than he returned or accounted to the defendant for, the defendant might show that the plaintiff had been discharged from the defendant's employ about two months previous to the time when the slanderous words were spoken, and that after his discharge the plaintiff had gone about among the defendant's customers warning them against him, saying that he would charge them usurious interest, sell them out, and break them up.

APPEAL by the defendant from a judgment of this court entered on a verdict of a jury at trial term.

The action was for slander, the alleged defamatory words being " You (meaning the plaintiff) are a thief and a scoundrel ; you have made false entries in my books ; you have sold flour for me, and charged and collected therefor more than you returned or accounted to me for, and kept the balance ; you and Clarkson stole \$3,000 from me."

The defendant on the trial offered to show in mitigation of damages the facts stated in the opinion, but the evidence was excluded.

James Clark, for appellant.

Culver & Wright, for respondent.

VAN HOESSEN, J.—The charge to the jury is unexceptionable ; and of all the exceptions taken only one seems to me to be well-founded. I say only one, for the three excep-

Vol. VII.—3

Palmer v. Lang.

tions appearing at folios 59 and 60 are merely a single exception taken three times in succession. The defendant sought to prove in mitigation of damages that the slanderous words complained of were spoken by him in the heat of passion, occasioned by recent conduct of a provoking character on the part of the plaintiff. The plaintiff was discharged from the defendant's employ on the 29th day of August, 1874. On the 22d day of October following, the quarrel occurred in which the defendant uttered the slander. The defendant attempted to show that between the dates just given, the plaintiff had gone about among the defendant's customers warning them against him, saying he would charge them usurious interest, sell them out, and break them up.

The court excluded the questions put to the plaintiff for the purpose of showing that he had actually given the defendant the provocation of maligning him to his customers. I think such exclusion was error. The evidence shows clearly that the defendant was smarting under the injury which he believed he had received through the plaintiff's misrepresentations. The quarrel in the course of which the defendant spoke the slanderous words begun by the defendant calling the plaintiff to account for his statements respecting him. These statements, calumnies if not true, were directly connected with the slander which is the subject of this action. They were recent, frequently repeated and damaging to defendant's business. They were not disavowed when the defendant taxed the plaintiff with them. (*Richardson v. Northrup*, 56 Barb. 105; Townshend on Libel and Slander, pp. 626, 627, 628, and 629.) I think the defendant should have been allowed to prove them by the plaintiff. Had they been proven, it is very doubtful if the damages would have been swelled to a thousand dollars. Had there not been a connection between the plaintiff's misrepresentations and the defendant's slander, the ruling of the judge at the trial would have been proper.

VAN BRUNT, J., concurred.

Palmer v. Lang.

Judgment reversed, new trial ordered, costs to abide event.

On a motion for a reargument the following opinion was filed on April 2d, 1877.

VAN HOESSEN, J.—The respondent cites two cases which he thinks were overlooked by the November general term, and which, he thinks, if they had been examined, would have led the court to a view of the law contrary to that taken in the decision. The cases referred to by the respondent were not overlooked. They were not cited because they have not the slightest reference to the point in question. The question is, whether the defendant in a libel suit may prove that the libels complained of by the plaintiff were published under the provocation of other libels published by the plaintiff concerning the defendant? To show that such proof is not proper, the respondent relies first on the case of *Lister v. Wright* (2 Hill, 320), which merely holds that evidence of *former controversies having no connection with the subject matter of the libels* ought not to be received.

The second case relied upon by the respondent is that of *Underhill v. Taylor* (2 Barb. 348), which very properly decides that irritating language spoken by the father of the plaintiff, was no excuse for the defendant's slander.

In the case at bar, the evidence showed conclusively that the words for the speaking of which this action was brought were uttered under the provocation arising from the circulation by the plaintiff of reports intended and likely to injure the defendant in business. At folios 59 and 60 of the case the defendant's counsel asked the plaintiff, who was a witness on the stand, whether he did utter the slanders which led to the hot words for which this suit was brought. The court excluded the question; and when the appeal was argued at the November (1876) general term, Judge Van Brunt and myself thought such exclusion erroneous.

It has always been the law that in actions of slander, as in actions of assault and battery, the defendant might prove

Palmer v. Lang.

provocation so recent as to induce a presumption that the blow or the slander was brought about by the immediate influence of the passion thus wrongfully excited by the plaintiff. In *Fraser v. Berkeley* (2 M. & Rob. 3), Lord Abinger admitted evidence of a provocation, namely, a libel published sometime previous to the battery.

It is for the jury to say whether the language uttered by the defendant was used because of the provocation received from the plaintiff. (*Botelar v. Bell*, 1 Md. 173.) Only nominal damages should be given where the parties publish defamatory matter one against the other. (Townshend on Libel and Slander, 2d edit. 414. See to the same effect *Finnerty v. Tipper*, 2 Camp. 72 and *May v. Brown*, 3 B. C. 126.)

Provocation may be proved not merely when it is contemporaneous but also when it is so recent that it may fairly be presumed that the defendant uttered his slander under its influence. It may be contemporaneous or *nearly* contemporaneous; it being for the jury to say whether the defendant was stung by the provocation into uttering the slander. (Townshend on Libel, 416.) A careful reading of the case of *Richardson v. Northrup* (56 Barb. 105) will show that the court did not intend to depart from the rules laid down in the cases I have cited.

The only connection that need be shown between the libel uttered by the defendant and that uttered by the plaintiff is, that the libel published by the plaintiff provoked the libel published by the defendant. (Addison on Torts, p. 996; *May v. Brown*, 3 B. & C. 126; *Tarpley v. Blabey*, 2 Bing. New Cases, 441.)

The references I have made to the testimony show clearly that the defendant was provoked into speaking the alleged slander by information which he had received that the plaintiff had slandered him in a manner calculated to injure his business; and it was error to refuse the defendant the opportunity of proving that the plaintiff had really uttered the slanders.

I am of opinion that the motion for a re-argument should

Bruce v. Carter.

be denied, and that a new trial should be had, as previously ordered.

LARREMORE, J., concurred.

CHARLES P. DALY, Chief Justice, was in favor of allowing a re-argument on the ground that it was doubtful upon the authorities of *Lister v. Wright* (2 Hill, 320) and *Underhill v. Taylor* (2 Barb. 348) whether the evidence offered in mitigation of damages in this case was admissible, and that the case of *Richardson v. Northrup* (56 Barb. 105) did not go so far as to authorize the admission of the evidence offered here.

Motion for re-argument denied.

JOHN M. BRUCE, Respondent, *against* WELLINGTON A. CARTER, Appellant.

(Decided February 5th, 1877.)

Where on the compromise of an action the defendant therein on his part gives his notes with an endorser, and the plaintiff on his part promises that on payment of the first of said notes he will give a release which upon payment of all of the notes, and not until then, shall take effect, and that he will then discontinue without costs and will not bring other suits, &c., the obligations of the parties are *independent*, the promise is a good consideration for the notes, and a failure to give the release upon the payment of the first notes, and where the release was not demanded, is not a good defense to an action brought on the last notes against the endorser by a person who took them for value before maturity with notice of the terms of the agreement in accordance with which they were made.

APPEAL from a judgment of the Marine Court of the city of New York entered upon an order of the general term of that court affirming a judgment entered upon a verdict rendered against the defendant by direction of that court at trial term. The facts sufficiently appear in the opinion.

Bruce v. Carter.

Geo. P. Avery, for appellant.

Albert Stickney, for respondent.

ROBINSON, J.—The two notes in suit, being each for \$1,000, were made in September, 1875, by Joseph Kelly, to the order of, and endorsed by, the defendant, and were executed and delivered in part performance of an agreement of compromise of certain actions in the Supreme and Superior Courts of this city, in which James J. A. Bruce and others were plaintiffs and said Joseph Kelly and others were defendants, which provided, among other things, for the payment to the plaintiffs in those actions, of six thousand dollars, as follows: Five hundred dollars in cash; fifteen hundred dollars by a note payable in ten days; one thousand dollars by a note payable November 1, 1875; one thousand dollars by a note payable in four months; one thousand dollars payable in a note at five months; and another one thousand dollars in a note payable in six months, the notes in suit being the two latter, and the agreement provided in consideration of such payment and obligation that when three thousand dollars had been paid, the suit in the Superior Court should be at once discontinued, and the decree therein modified in certain particulars, and that each of the plaintiffs in those actions should also at that time execute and deliver to the defendants a release under seal, duly acknowledged, releasing each and every one of the defendants in both of said actions "from all claim and demand of every kind and nature for or on account or by reason of the various matters, acts and transactions set forth and alleged in the complaints in said actions, or in either of them, which release, however, shall not become operative in favor of the defendants until all of said notes are paid, when said release shall become valid and binding," and thereupon the suit in the Supreme Court was to be discontinued without costs to either party, and no suit was to be brought upon the undertaking given by plaintiffs in the Supreme Court suit, or for damages. All those notes have

Bruce v. Carter.

been paid except the two in suit; they were transferred to the plaintiff, by James J. A. Bruce, in January, 1876, before maturity, in payment of advances he had made the plaintiffs in those actions to carry them on.

The only point taken by the defendant on the appeal which requires attention is, that the agreement not having been fulfilled by the plaintiffs in those actions, in as much as the three thousand dollars first specified had been paid and no such release as the agreement provided for had been executed or tendered before the commencement of this action, and the plaintiff in this action was in no better position than were the plaintiffs in those, as he took the notes knowing they were given on that settlement. This objection to a recovery was taken on the trial and was overruled, and a verdict for the plaintiff directed by the judge in favor of the plaintiff, to which exception was taken. The notes in suit were taken by plaintiff before maturity upon a valid consideration. They were not impeachable for fraud or want of consideration. The release that was to have been given by the plaintiffs in the actions in the Supreme and Superior Courts did not constitute the entire nor any specific consideration for these notes. It was never demanded and was not to become operative, until both the notes were paid. Its execution and delivery contained no element of value or efficiency until the payment of the notes, which would have been effectual as a complete accord and satisfaction without its execution. The obligations of the parties to the agreement were independent, and Kelly, the maker, has a complete remedy for any damages he may have sustained from any breach of the agreement to execute and deliver it. But that ground of claim furnishes no defense to the defendant against the notes (*Freligh v. Platt*, 5 Cow. 94; *Payne v. Ladue*, 1 Hill, 116; *Bellows v. Folsom*, 2 Robt. 138; *Lewis v. McMillen*, 41 Barb. 426). Plaintiff was entitled to recover unless notice had been given him of the existence of some adverse claim growing out of the agreement upon which it was given, which could be personally asserted by the defendant (*Davis v. McCready*, 17 N. Y. 230; *Lasher v. Williamson*, 55 N. Y. 619).

Southard v. Benner.

The defendant was not a party to nor (so far as appears) in any way interested in the original agreement. He was but surety for Kelly, and his duty is to pay his obligation and take his remedy against his principal. (*Williams v. Brown*, 2 Keyes, 486; s. c. 4 Abb. Ct. App. Dec. 609; *Lewis v. McMullen*, *supra*.)

The judgment should be affirmed.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Judgment affirmed.*

CHARLES C. SOUTHARD, AS ASSIGNEE IN BANKRUPTCY, &C.
Respondent, *against* HIRAM BENNER *et al.* Appellants.

(Decided February 5th, 1877.)

The courts of this state have jurisdiction of an action by an assignee in bankruptcy to recover the proceeds of the foreclosure of a chattel mortgage made by the bankrupt in fraud of his creditors. Such a suit is not a matter or proceeding in bankruptcy within § 711 of the U. S. Rev. Stat., providing that the courts of the United States shall have exclusive jurisdiction "of all matters and proceedings in bankruptcy."

When in such an action the plaintiff has given evidence of uninterrupted possession and disposal of the mortgaged chattels by the mortgagor; *Held*, that the statutory presumption of fraud is raised, and a motion to dismiss the complaint on the ground that as respects the issue of fraud, no cause of action has been established, should be denied; and further

Held, that it is not error in such an action to charge, that if the mortgage was not fraudulent and defendants, the mortgagees, knew of sales of the chattels being made but supposed the proceeds were to be applied to the payment of their debts, they were entitled to a verdict; but if the jury found the converse of those facts, the plaintiff would be so entitled.

APPEAL from a judgment in favor of Southard, as assignee, plaintiff entered upon a verdict rendered at a trial

* The decision here was affirmed by the Court of Appeals, Feb. 23d, 1878.

held before Judge VAN BRUNT and a jury. The exceptions taken were to the refusal of the court to dismiss the complaint at close of plaintiff's case and to portions of the judge's charge.

The facts of the case were as follows :

On Dec. 4, 1872, one William H. Decker executed a chattel mortgage to defendants, who were copartners, to secure payment of \$30,000 on demand. The mortgage covered lumber of various kinds, being all the stock owned by the mortgagor, who continued in business until adjudged a bankrupt Dec. 15, 1873. During the period above mentioned Decker sold this lumber at the rate of about \$30,000 a month, and made purchases to replenish his stock. No separate account was kept of the lumber mortgaged and that subsequently bought, and the proceeds of the sales were used by the mortgagor to meet his general liabilities and living expenses. On Feb. 3, 1874, defendants foreclosed the mortgage and realized from the sale thereunder the sum of \$2,217 36. Plaintiff, as assignee in bankruptcy, brought suit to recover the proceeds of the foreclosure, claiming that the mortgage was void. Judgment upon a verdict was given in his favor for the sum named, with interest, from which the defendants appealed.

A. J. Vanderpoel, for appellant.

Dudley Field, for respondent.

LARREMORE, J.—No objection was made on the trial to the jurisdiction of the court. But on the argument of the appeal it was urged that plaintiff, as assignee in bankruptcy, could not maintain this action in a State court.

Section 711 of the Revised Statutes of the United States confers upon the Federal Courts exclusive jurisdiction of all matters and proceedings in bankruptcy, but this is not a proceeding in bankruptcy. The act to declare and extend the powers of executors, assignees, and trustees, and protect creditors from fraud (Laws 1858, ch. 314), authorizes an assignee of an insolvent for the benefit of creditors to disaffirm and

Southard v. Benner.

treat as void all transfers made of any estate or property in fraud of the rights of any creditor.

Our attention has been called to the case of *Frost v. Hotchkiss* (14 Bank. Reg. 443) as an authority upon the question of jurisdiction. There the suit was brought, not by the assignee, but by a trustee in bankruptcy (chosen as such at a meeting of the creditors), to recover real estate conveyed by the bankrupt to his wife in fraud of creditors. The court on demurrer held that the State court had no jurisdiction, and properly so held, for § 5103, Revised Statutes United States, in pursuance of which such trustee was chosen, expressly declares that the winding up and settlement of any estate under its provisions shall be deemed to be proceedings in bankruptcy. The sections of the act defining the powers and duties of an assignee in bankruptcy, do not prohibit a suit by him at law in a State court against a party whom the debtor might have sued. We are of opinion, therefore, that plaintiff had legal capacity to sue in this court. (*Cook v. Whipple*, 55 N. Y. 150.)

The first exception taken at the trial, was to the denial of the motion to dismiss the complaint on the ground that no cause of action had been established. In this we think there was no error. The statute of frauds expressly declares that every assignment of goods and chattels by way of mortgage unless accompanied by immediate delivery and followed by an actual and continued change of possession of the thing mortgaged, shall be presumed to be fraudulent and void as against creditors of the mortgagor, and shall be conclusive evidence of fraud unless it shall be made to appear that the transaction was in good faith, and without intent to defraud. (2 R. S. [Edmonds ed.] § 5, p. 140.)

The uninterrupted possession and disposal of the mortgaged property by the mortgagor, raised the statutory presumption of fraud as to the validity of the transaction, and it was the province of the jury to decide upon the facts and circumstances presented whether or not the mortgage was made in good faith. (*Ford v. Williams*, 24 N. Y. 359.)

The remaining exceptions to the judge's charge and

Johnson v. Chappell.

refusals to charge may be considered under one head. The jury were instructed that if the mortgage was not fraudulent, and defendants knew of the sales of lumber, but supposed the proceeds were to be applied to payment of their debt, they were entitled to a verdict; and upon facts showing the converse of this proposition, the plaintiff would be entitled to a verdict. The charge of the learned judge was in conformity with the law as settled in *Gardner v. McEwen* (19 N. Y. 123); *Ford v. Williams* (24 N. Y. 359); *Conkling v. Shelley* (28 N. Y. 363); *Miller v. Lockwood* (32 N. Y. 293); *Frost v. Warren* (42 N. Y. 207).

There was nothing said that could have misled the jury, and no valid reason has been shown for disturbing the verdict.

CHARLES P. DALY, Ch. J. and ROBINSON, J., concurred.

Judgment affirmed with costs. .

TILMAN S. JOHNSON *et al.* Respondents, *against* GEORGE A. CHAPPELL *et al.* Appellants.

(Decided upon the argument January 11th, 1877, opinion filed February 5th, 1877.)

Under Sec. 307 of the Code of Procedure (old) no more than ten dollars costs can be allowed for drawing interrogatories to annex to a commission, although more than one set of interrogatories may be drawn and annexed.

APPEAL from an order made by Chief Justice CHARLES P. DALY, affirming the decision of the clerk on taxation of costs.

One commission was issued in the action, to which was annexed four separate sets of interrogatories,—one set for each of four witnesses to be examined thereunder. The clerk in taxing the plaintiffs' costs allowed forty dollars as

Johnson v. Chappell.

costs for drawing said interrogatories, being ten dollars for each set. The defendants claimed that but ten dollars should be allowed for drawing all.

N. B. Cooke, for appellant.

T. H. & W. L. Van Derzee, for respondents.

ROBINSON, J.—This is an appeal from an order affirming the decision of the clerk, on taxation of costs in allowing charges of ten dollars for each set of interrogatories annexed to a single commission. Four witnesses were examined, and separate interrogatories were annexed for the examination of each witness. The allowance beyond ten dollars for the whole set of interrogatories was, in my opinion, erroneous. The language of Sec. 307 of the Code appears to me explicit “for attending upon and taking the deposition of a witness conditionally or attending to perpetuate *his* testimony,” indicating the allowance to be distributive as to each attendance for the examination of each witness—and then “for drawing interrogatories to annex to a commission for the taking of testimony, ten dollars.” This allowance is not for the drawing of *each* interrogatory or *an* interrogatory, but entirely for the drawing (collectively) of (all) the interrogatories to be annexed to a commission.

This is in accordance with the views of the general term of the Superior Court (38 Supr. C. R. [6 J. & S.] 4,) and of Judge Lawrence, in *Bumstead v. Hoadley* (Daily Reg. Dec. 19, 1876). The right to costs is “*strictissimi juris*,” but it seems unnecessary, in this case, to apply that principle, as the intent seems clear. The order should be reversed and the allowance for all the interrogatories annexed to a separate or single commission reduced to \$10.

Costs and disbursements of appeal allowed appellant.

LARREMORE, J., concurred.

Ordered accordingly.

Dale v. Brinckerhoff.

WILLIAM DALE, Appellant, against WILLIAM BRINCKERHOFF et al. Respondents.

(Decided February 5th, 1877.)

A gratuitous bailee who, without notice to the bailor, and without his authority, sends to auction the property which is left with him, and has it sold, is guilty of conversion of the property.

It is the duty of a gratuitous bailee who desires to terminate the bailment, to notify the bailor to take away the property, and if he does not then take it away within a reasonable time, or if he cannot after reasonable inquiry be found, then the bailee should place the property on storage at the risk and charge of the bailor, and where if the storage is left unpaid, it may be sold by the storekeeper for the payment of his charges when they approach near to the value of the article.

APPEAL by the plaintiff from an order of the general term of the Marine Court of the city of New York, reversing a judgment of that court, in favor of the plaintiff, entered on the verdict of a jury, and directing a new trial.

The action was brought by the plaintiff, Dale, to recover damages for the conversion of certain machinery left by him in the gratuitous custody of the defendants, at their store, in New York city, with their permission. Some time after the machinery was placed there, and during the absence of the plaintiff from the city, the defendants, without notice to plaintiff, and without any authority from him, sent the machinery to an auction room, where it was sold by their instructions, and brought \$10. The jury found the value of the machinery to be \$100.

C. H. Machin, for appellant.

Wm. H. Arnoux, for respondent.

CHARLES P. DALY, Chief Justice.—There was no ground

Dale v. Brinckerhoff.

for disturbing this judgment. If the defendants, without authority, sold the plaintiff's machine, it amounted to a conversion. They were gratuitous bailees. It was placed in the defendants' store in August, 1872, the defendants having told the plaintiff that he might bring the machine there; that they would give it room, and would not charge him any rent for it. If they wished to terminate this bailment, the proper course was to notify him, and if he did not, within a reasonable time take it away, or if he could not, after reasonable inquiry, be found, to place it on storage, at his risk and charge, and the storekeeper would have the right, if the storage was not paid, to sell the machine for the payment of costs and charges.

The defendants had no right to sell it. They had no charges for keeping it. They had agreed to keep it gratuitously, and if unwilling to do so any longer, and they meant to charge for keeping it thereafter, they were bound to show that they had notified the plaintiff to that effect. If they could not notify him, not knowing where he was, or where a letter would reach him, then their course was to put it on storage with a person who follows that business for hire. Instead of doing this they sent it to auction, where it was sold, on their account, for \$10; the machine having cost \$1,000 to build; and at the lowest estimate upon the evidence, it was of the value of \$120. This was a conversion, whatever may have been their private intent (*Pease v. Smith*, 61 N. Y. 477).

They gave evidence of a very defective kind to show that they notified the plaintiff to take it away, or that they would sell it to pay costs and charges. There were no costs or charges then, nor could there be any under the agreement. The evidence was simply that their bookkeeper addressed a letter to the plaintiff at Washington, to that effect. It was not shown that the plaintiff was there, nor when this letter was sent, or to what address in Washington, or that it was duly mailed. One of the defendants was told, before this letter was written, that the plaintiff could be seen somewhere in Greene street, and testified that when

The People v. Devlin.

he heard that the plaintiff was in town, he "mailed a note to him, at his last place (where, is not stated), to come to take the property away." This evidence of notice, the jury were entitled to regard as unsatisfactory; and even if it had been shown that the plaintiff had in fact been notified, all that the defendants then would have been justified in doing, would have been to have stored the machine safely, leaving the plaintiff to pay the costs and charges thereby incurred, and subject to the risk of its being sold by the storekeeper, when the costs and charges for storage had approached so near the value of the article as to make the sale of it to pay the expenses justifiable. (*Rowland v. Miln*, 2 Hilt. 150; *Fisk v. Newton*, 1 Denio, 45; *Browning v. The Long Island R. R. Co.* 2 Daly, 121.)

The judgment of the general term should therefore be reversed, and the judgment of the trial term affirmed.

ROBINSON and LARREMORE, JJ., concurred.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK *against*
CHARLES DEVLIN.

[FIVE CASES.]

(Decided February 5th, 1877.)

Where the court of Oyer and Terminer at the time of making an order forfeiting a recognizance grants a certiorari, the writ stays all proceedings on the forfeited recognizance; and where the writ with the order allowing it and the other papers constituting the record in such a case are filed with the county clerk, his proceedings are stayed, and a docket of judgment made by him at the time of such filing, is erroneous, and will, on application to the general term of this court, be discharged.

The People v. Devlin.

The jurisdiction of this court as to judgments upon forfeited recognizances, and the statutes upon the subject considered. Per CHARLES P. DALY, Chief Justice.

APPLICATION at general term for an order to expunge dockets of judgments entered upon forfeited recognizances.

The applicant, Devlin, received notice to produce one William M. Tweed, a prisoner, at a court of Oyer and Terminer or to show cause why the recognizances in these five cases should not be estreated (he being the bondsman). He appeared and showed cause why he did not produce the prisoner. An order was made to estreat in each case, but simultaneously a certiorari was granted by the Supreme Court, the same judge who had held the Oyer and Terminer [Donohue, J.] granting it.

The orders of estreat and the certioraris were delivered to the clerk of the Oyer and Terminer at the same moment. The records upon the certioraris were made up and delivered to the clerk of the County of New York, as clerk of the general term of the Supreme Court where the certioraris were returnable. He, finding among the records the orders of estreat and recognizances, docketed judgments upon them against Devlin. The writs of certiorari were dismissed by the general term and a writ of error, with a stay, was granted to the Court of Appeals. Pending the writ of error, Devlin, who desired to transfer real estate upon which the judgments were apparent liens, applied at special term of this court for an order expunging the dockets. The motion was denied, with leave to renew at the general term, and thereupon this application was made.

Dudley Field, for applicant.

B. K. Phelps, district attorney, for the people.

CHARLES P. DALY, Chief Justice.—Prior to 1844, the judgment upon a forfeited recognizance was entered up, and was a judgment of the court where the forfeiture was ordered. But, by the 8th section of the 4th article of the

act of May 7th, 1844, for the regulation of the police of this city, it was provided that recognizances on being forfeited should be filed by the district attorney, together with a certified copy of the order of the court, forfeiting the same, in the office of the clerk of the city and county of New York; and that thereupon the clerk should docket the same in the book kept by him for docketing judgments, as if the same were a transcript of a judgment record for the amount of the penalty and the recognizance; and that the certified copy of the order forfeiting the recognizance should be the judgment record. That such judgment should be a lien on the real estate of the person entering into the recognizance from the time of the filing of the papers and docketing the judgment, and that an execution might be issued to collect the amount of the recognizance, in the same form as upon a judgment recovered in this court in an action of debt, in favor of the people.

It was provided by the act of May 13th, 1845 (Laws of 1845, p. 250), that judgments so docketed with the county clerk, and the executions issued thereon, should be subject to the jurisdiction and control of this court in the same manner as if such judgments had been docketed in this court.

By the act of April 25th, 1861 (Laws of 1861, p. 781), it was declared that the 8th section of art. 4 of the act of 1844, before referred to, should continue in force in the city and county of New York, and by the 6th section of the act of April 12th, 1854 (Laws of 1854, p. 464), this court was, among other things, authorized to correct and discharge the docket of liens and of judgments entered upon forfeited recognizances.

Taking all these provisions together, I think we have full authority to correct any clerical error or mistake that may have been made by the clerk in erroneously docketing the judgment.

As respects the forfeiting of the recognizance, that is a matter exclusively for the court where the recognizance was taken. This was the rule of the common law. It was held

The People v. Devlin.

in *The King v. Tombs* (10 Mod. 278) that the judges of Oyer and Terminer are the proper judges to determine whether recognizances are to be estreated or spared; that it is for the advantage of public justice that it should be in the power of the justices of Oyer and Terminer to spare the recognizances, if upon the circumstances of the case they see fit, and there is nothing in the statutory provisions above referred to, changing the rule of the common law.

The object of the provisions in the acts of 1845 and 1851, making the judgment subject to the jurisdiction and control of this court, and authorizing us to correct and discharge the docket of the liens and of the judgment, was evidently to give the court, from which, by the previous act of 1844, the execution was to issue, power to correct any error or mistake respecting the judgment not involving the merits, this court having, since the act of April 21st, 1818, a power to remit the fine or forfeiture as a matter of grace and favor upon good cause shown, and upon such terms as were just and equitable, save in the cases afterwards excepted by the Revised Statutes. (1 R. S. p. 486, § 37.)

The recognizance in this case was, after a full hearing, ordered by the Court of Oyer and Terminer to be forfeited, but the court immediately thereupon, and before the docketing of that order by the county clerk, allowed a writ of certiorari, the service of which writ, and the order allowing it, operated as a stay of all further proceedings until the decision of the court of Oyer and Terminer was reviewed by the general term of the Supreme Court. (*Patchin v. Mayor*, *ſc.* 13 Wend. 664; *Conover v. Devlin*, 5 Abb. Pr. 182.) All the papers having been filed with the county clerk, that a return might be made to the certiorari, he having the recognizance and the order of the Oyer and Terminer forfeiting it among the papers, erroneously docketed it as judgment, the papers not having been filed with him for that purpose, but that he might make the proper return to the writ of certiorari.

The court of Oyer and Terminer, by allowing the writ, stayed any further proceedings upon the order forfeiting the

recognizances. The judge who was presiding in the Oyer and Terminer, and who directed the recognizances to be forfeited, made the order allowing the writ of certiorari to issue; and when the writ of certiorari with the order allowing it was filed with the county clerk it was a service of the writ, and of the order allowing it, and operated as a stay of any further proceedings upon the forfeiture of the recognizance. The proceedings show that it was not the intention of the court that the judgment should be docketed in the manner provided by the act of 1844; for had the court so intended, it is to be presumed that it would have deferred the allowance of the writ of certiorari until after the judgment was docketed by the county clerk. It has in fact been doubted, if a qualification in the order allowing the writ, to the effect that it should not operate as a stay of proceedings, would even prevent its operating as a stay. (*Conover's Case*, 5 Abb. Pr. 190, 191.)

The affidavit of the defendant Devlin, in the present application, states that he owns a large amount of real property in the city of New York, and more than sufficient personal property to satisfy the five judgments entered against him; that he made no attempt to have the entries of the county clerk creating those judgments erased from the docket until lately, because he understood that the certiorari was a stay of proceedings, and that the district attorney would take no steps to enforce the judgments; that he has, however, agreed lately to sell some property, and finds that the dockets made creates an apparent lien thereon, and that he cannot dispose of the property until the docket is erased.

We think that he is entitled to the relief asked; that the docketing of judgments in these five cases, by the clerk, was erroneous, all proceedings having been stayed by the allowance and service of the writ of certiorari, and that an order should be made, correcting the error, and discharging the docket of lien and of the judgment as improperly entered, without prejudice, however, or in any way affecting the forfeiture of the recognizance, or the right of the people there-

Crow v. Colton.

after to have the order of the Oyer and Terminer forfeiting it, and the recognizance, docketed as a judgment, in the manner provided by law, when the right to do so hereafter may exist.

ROBINSON and LARREMORE, JJ., concurred.

Ordered accordingly.

HENRY N. CROW, AS ASSIGNEE, &C. Respondents, *against*
HENRY COLTON, Appellant.

(Decided February 5th, 1877.)

A cause of action accruing to an assignor for services rendered by him after the date of a general assignment for the benefit of creditors, but before the delivery of the assignment, does not pass to the assignee.

APPEAL by the defendant from a judgment of this court entered upon a verdict in favor of the plaintiff.

This action was brought by Henry M. Crow, as assignee of Ellis N. Crow, an insolvent debtor, to recover the price of certain services rendered in the month of April, 1876, by Ellis N. Crow to the defendant Colton. It was proven upon the trial that a general assignment for the benefit of creditors, dated and acknowledged on the 25th day of February, 1876, was delivered by the assignor to the assignee on the 13th day of May, 1876.

H. F. Pultz, for appellant.

William A. Coursen, for respondent.

VAN HOESSEN, J.—The plaintiff is the assignee of Ellis N. Crow. The assignment bears date, and was acknowl-

Crow v. Colton.

edged on the 25th day of February, 1876. It was not actually delivered to the plaintiff till the 13th day of May, 1876. In the month of April, 1876, subsequently to the signing and acknowledging, but prior to the delivery of the assignment, Ellis N. Crow did some carting for the defendant, and the plaintiff brings this action as assignee to recover the price of the carting.

It is objected by the defendant that the plaintiff has no interest in the cause of action because it accrued to the assignor, Ellis N. Crow, after the making of the assignment, and consequently was not embraced in his estate at the date of the assignment. To this objection the plaintiff answers that the assignment took effect from its delivery, and as it was not delivered until May, it transferred to the assignee all the property and rights of action acquired by the assignor in April. In this I think the plaintiff is in error. No matter what may be the day of the delivery of the assignment, only that property passes to the assignee which the assignor owned at the date of the assignment. Subdivision 6 of section 2, chap. 348, Laws of 1860, provides that the inventory shall contain a list of "all such debtor's estate at the date of such assignment." The question as to when a conveyance shall take effect, is altogether different from the question as to what property is transferred by the conveyance. In this case, when, in May, the assignment took effect, it conveyed to the plaintiff the estate, real and personal, owned by Ellis N. Crow on the 25th of February. The plaintiff had no interest in the claim against the defendant, which was for work done in the following April. The judgment is therefore erroneous.

VAN BRUNT, J., concurred.

Judgment reversed, new trial ordered, costs to abide event.

Imhorst v. Burke.

HEINRICH IMHORST, Respondent, *against* EDWARD BURKE
et al. Appellants.

(Decided February 5th, 1877.)

In an action for conversion of second-hand furniture, the testimony of plaintiff alone as to its value, he not being shown to be an expert and testifying only that he had purchased and knew the original cost of a part of the articles, and that in his opinion one-third off original cost was their value, is insufficient evidence to sustain a finding of the value of the property converted.

APPEAL by the defendants from a judgment of this court entered upon the report of John P. Crosby, as referee, to whom it had been referred to hear and determine the issues.

The action was brought by the plaintiff Imhorst to recover damages for the conversion of certain furniture. The referee found that the value of the furniture was \$1,179 77, and that the plaintiff should recover that sum. The defendants excepted to the finding of the referee of that sum as the value of the furniture. The only evidence given before the referee of value of the articles converted was the testimony of the plaintiff, which is stated in the opinion.

William Hildreth Field, for appellant.

Thomas S. Moore, for respondent.

*Per Curiam.**—We are of opinion that the evidence of value of the goods withheld from the plaintiff is too vague, general and uncertain to sustain the finding of the referee on that question. The goods consisted of office furniture, desks, chairs, carpets, shades and screens, iron railings, stoves, looking-glasses, brushes, blotters, paper baskets and similar articles, all which had been used by Seymour, McCulloch & Co. for some time before the plaintiff acquired title to them.

* Present, VAN BRUNT, JOSEPH F. DALY, and VAN HOESEN, JJ.

Wright v. Wright.

Without showing the length of time they had been in use ; the amount of wear they had been subjected to, the condition in which they were at the time the plaintiff demanded the return of them, or their adaptability to use elsewhere ; the plaintiff, who was his own and the sole witness as to value, claiming to be an expert because he had furnished offices and bought and sold furniture on several occasions for his own use, and in the course of his business, was allowed to state, as the basis of his valuation, the original cost of the articles with a deduction of "one-third old for new." This rule of one-third off the cost was adopted by the referee in assessing the value. No reason was given for applying such a rule except the plaintiff's statement that he considered the property worth one-third less than its original cost. He had not bought all the property himself, and he testified from the books as to the cost of a portion of it at least. There can be no ground for such an inflexible rule with reference to second-hand furniture ; the value of which must depend upon its condition.

Judgment reversed, new trial ordered, costs to abide the event.

WILLIAM P. WRIGHT, Respondent, *against* GEORGE S.
WRIGHT, Appellant.

(Decided February 5th, 1877.)

Where there are two legally distinct accounts existing between plaintiff and defendant, the latter, whose defense is set-off of sums paid upon drafts drawn upon him by plaintiff, cannot be allowed to testify that he intended to apply the payments to the account which is the subject of plaintiff's claim, after testifying and producing clear proof that he had previously applied the payments on the other account.

It seems, that where no application of a payment is made by either party, and there are two accounts, the law will presume the payment to have been made by the

Wright v. Wright.

party in discharge of his obligation as trustee, having sureties for the faithful performance of his trust, rather than in discharge of a simple debt, created by operation of law.

APPEAL by the defendant from a judgment of this court entered in favor of the plaintiff, upon the report of William Watson, Esq., as referee, to whom it had been referred to hear and determine the issues.

The action was brought by William P. Wright against his brother, George S. Wright, who was administrator of their father's personal estate and who had also collected the rents of the real estate which had belonged to his father, to recover plaintiff's share of such rents and profits. The answer contained a defense of set-off, embracing several items, among which were two of \$1,000 each, as "money advanced" to plaintiff at his request in payment of drafts. These drafts, which were drawn upon defendant, the answer also alleged were paid "for the accommodation of the plaintiff."

The drafts were put in evidence at the trial. One, dated March 15th, 1870, was drawn on account of plaintiff's distributive share in his father's estate; the other, dated Nov. 7th, 1870, was drawn generally "on account." To the first draft was annexed a receipt acknowledging payment of the amount as plaintiff's distributive share in his father's estate. Upon the defendant's cross-examination, it appeared that he had at his accounting as administrator, before the surrogate of Westchester county, included the two drafts in a statement then presented to the surrogate as amounts paid William P. Wright, on account of his distributive share of his father's estate.

The referee afterwards refused to allow the defendant to testify what was his intention as to the application of the payments, and to the ruling the defendant excepted. The referee found that no proof was produced by the defendant in support of the defense of set-off as respects the two drafts, and to this finding defendant also excepted.

Clarkson N. Potter, for appellant.

Wright v. Wright.

Alex. Thain, for respondent.

ROBINSON, J.—The rule of law, as to the appropriation of payments, when different accounts exist between the parties, is correctly stated by the learned counsel for the defendant, as follows: The debtor is entitled to apply any payment he makes to whatever account he pleases; if he makes no application the creditor is then at liberty to apply it as he pleases, and if neither apply the payment to any particular debt, the law will apply it as may be just and equitable. The parties to the controversy are brothers;—sons, heirs-at-law, and next of kin, of their father John T. Wright deceased, of whose personal estate the defendant is also administrator. As coheir and tenant in common of the real estate he collected the rents and profits, and this action is brought by plaintiff to recover his proportion thereof, as allowed by 1 R. S. 750, § 9.

The question presented on the trial was to the right of set-off claimed as to two drafts drawn by plaintiff, in March and November, 1870, from Olympia, W. T., on defendant at New York, for \$1,000 each, the first drawn and receipted for as "on account of plaintiff's distributive share in his father's estate," and the other generally on account. In an accounting had by the defendant as administrator before the surrogate of Westchester county for the personalty, he, in his verified account and in an accompanying schedule presented in 1875, charged the plaintiff and claimed credit for these two payments to plaintiff as advances to the next of kin, and the fact has not been contested by the latter. In the absence of any decisive proof of the character of the payments the law would raise, without further explanation, a presumption that the second advance was a payment on the like account as the first, and there is no legal or equitable consideration which would require its application, either as a payment or counter claim by way of set-off to the claim for rent of real estate owned by him, and collected by the defendant, rather than towards plaintiff's distributive share of the personalty. On the contrary, the application, in the absence of any election by either party, ought rather to be

Wright v. Wright.

made in discharge of the defendant as trustee, having sureties for the faithful performance of his trust, rather than to a mere simple debt created by operation of law, the former being the most stringent and onerous. The decision of the referee, to this effect, was but just and proper. After such positive oath of the defendant as to the original application of these payments, his attempt to withdraw it from that account, and to use the amount of one or either of these drafts not by way of payment, but of set-off, in the present action, is untenable, and the offer of the testimony foreshadowing such a purpose was properly rejected. His offer was as follows: "That the defendant had been appointed administrator of his father, and believing the rents of the premises were part of his estate to be collected by him as administrator, had so received the same;" and it being overruled, his counsel excepted. There is no pretence thereby disclosed, that he had so commingled these rents with the personal estate in his accounting before the surrogate, that plaintiff had already received a just and proper credit for them. On the contrary, it affirmatively appeared that in the schedule on such accounting of receipts as administrator, the moneys collected by defendant for rent were not included. The offer was therefore pointless, so far as it would tend to establish any legal or equitable defense, and was not admissible under any aspect as aiding the counter claim by way of set-off set up in the answer. Under these views the ruling of the referee in rejecting the evidence offered was correct. The judgment should be affirmed.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Judgment affirmed.

WILLIAM BRENNAN *et al.* Appellants, *against* CHARLES H.
WILLSON *et al.* Respondents.

(Decided February 5th, 1877.)

A general assignment for the benefit of creditors to three assignees who all accept the trust vests the estate of the debtor in them jointly, and although one afterwards notifies his co-assignees that he resigns the trust and will not act, and fails to give a bond, the two remaining assignees cannot act without him if he is living and has not been removed by the court, and a conveyance by them alone of the debtor's real estate is void as against the creditors.

It seems, that after all the assignees named in the general assignment have accepted the trust, no one of them can by any act of his own, or of his cotrustees, be relieved from the duties and powers with which he has thus become charged and clothed, and that he can only be relieved by an order of the court.

It seems, also, that a failure of an assignee to give a bond is sufficient cause for his removal by the court.

APPEAL by the plaintiffs from a judgment of this court entered in favor of the defendants Willson and Newman, upon a decision of Judge JOSEPH F. DALY, made at special term dismissing the complaint.

The facts of the case were as follows :—

On the 2d day of July, 1875, Duke and Moore executed an assignment for the benefit of their creditors, to Charles H. Willson, Allen G. Newman, and James D. Trimble, who all in writing accepted the assignment, which was afterwards recorded.

On the 18th day of July, 1875, James D. Trimble resigned, and refused to act as assignee, and thereupon Willson and Newman, the other assignees, filed their official bond, which was duly approved. The resignation of Trimble was addressed to his associates Willson and Newman, who thereupon obtained from Duke and Moore a second assignment to themselves only. Willson and Newman then filed a second bond, under the latter of the two assignments. Trimble never was

Brennan v. Willson.

removed by the court, nor was any step taken by him, or by any one else, to relieve him from the obligations he had assumed by accepting the assignment of July 2d, 1875. In November, 1875, certain property in 54th street, being part of the assets of the insolvents Duke and Moore, was sold by Willson and Newman, as assignees, at public auction, and bought by Brennan, the plaintiff in this action, who paid to the assignees, at the time of the sale, \$2,100, ten per cent. of the purchase money. Brennan, after having had the title examined, refused to complete the purchase of the property on the ground that Trimble had not signed the bond under the assignment of July 2d, 1875, and therefore could not lawfully convey or join in conveying any portion of the assigned property, and that Willson and Newman, being only two of the three trustees who had accepted that assignment, could not alone make a valid conveyance. Brennan also objected that the second assignment, that of August 6, 1875, conveyed no rights to the assignees, as Duke and Moore, the assignors, had parted with all their interest in their assets when they executed the assignment of July 2d.

Brennan demanded the return of the ten per cent. he paid at the time of his purchase at the auction sale, and then brought this action to recover the money so paid, together with other outlays he had made.

Erastus F. Brown, for appellants.

De Witt C. Brown, for respondents.

VAN HOESSEN, J.—The learned judge at special term was governed in his decision by the opinion of Judge Grover, in the case of *Juliand v. Rathbone* (39 N. Y. 375), and following that opinion, he could not have done otherwise than hold that the second assignment was valid; and that, in consequence of Trimble's failure to execute a bond, as required by law, the first assignment failed to take effect; and that if the second assignment were valid, then the defendants were confessedly able to make a good title, and the

Brennan v. Willson.

plaintiff was bound to complete his purchase, and was not entitled to recover in this action. The learned judge at special term did not decide, and, following, as he did, the opinion of Judge Grover in *Juliand v. Rathbone*, it was not necessary to determine, whether or not, a conveyance made by two of three assignees was valid, where the third assignee was living, and had not been removed, though unwilling to execute the duties of his trust. If the opinion of Judge Grover were in accordance with the law as it is now expounded by the Court of Appeals, there is no doubt but that the judgment at special term should be affirmed, for in the case at bar, as in *Juliand v. Rathbone*, the conveyance tendered to the plaintiff was executed not only by the assignees (Trimble included), but also by the assignors themselves; and if the title in *Juliand v. Rathbone* were good and sufficient, then the title offered to the plaintiff in this action was likewise complete.

Since the trial of this action at special term, however, two decisions of the court of last resort have been published in full, and they both enounce doctrines absolutely irreconcilable with the views expressed by Judge Grover in the case adverted to. The decisions are those in *Thrasher v. Bently* (1 Abbott's New Cases, 39) and *Syracuse, &c. R. R. Co. v. Collins* (1 Abbott's New Cases, 47). They both declare the law to be, that the giving of a bond by the assignor is not a pre-requisite to the validity of the assignment, but that the assignment, *ex proprio rigore*, transfers the property to the assignee. The assignors, after making an assignment, have not any interest whatever in the assigned property. A conveyance made by the assignors, subsequently to their assignment is, therefore, merely an idle ceremony.

The assignment of July 2d, 1875, was accepted by all three assignees. Trimble, though he did not follow up his acceptance of the trust by giving the necessary bond, became vested, conjointly with Willson and Newman, with the property included in the assignment. Having accepted the trust, he could not by any act of his own, or of his cotrustees, be relieved from the duties and powers with which he was clothed and charged. He could be discharged only by an

Wright v. Wright.

order of the court. (*Thatcher v. Candee*, 4 Abb. Ct. Appeals, Dec. 387.) His failure to give a bond was sufficient cause for his removal by the court. (*Barbour v. Everson*, 16 Abb. Pr. 366.) But until he had been removed, it was not competent for Willson and Newman to act without him (*Thatcher v. Candee*, above cited); and before executing the bond, he could not lawfully dispose of the assigned estate. Willson and Newman alone could not convey to the plaintiff a clear title to the property which they had sold to him at the auction sale as against the creditors of Duke and Moore (4 Abb. Ct. Appeals Dec. 391). The plaintiff was under no obligation to take a bad title, and was clearly entitled to recover.

VAN BRUNT, J., concurred.

Judgment reversed, new trial ordered, costs to abide event.*

EMMA F. WRIGHT, Respondent, *against* GEORGE P.
WRIGHT, Appellant.

(Decided February 5th, 1877.)

Notice to the defendant's attorney of the existence of a lien of the plaintiff's attorney upon such judgment as may be recovered in the action is not notice to the defendant, and will consequently not protect the plaintiff's attorney in case a settlement is made by the parties to the action without providing for his lien.

APPEAL by the defendant from an order made at special term of the Court of Common Pleas by Judge JOSEPH F. DALY, setting aside a satisfaction of judgment and ordering a reference to ascertain the amount of the lien of plaintiff's attorney for costs.

* Affirmed by the Court of Appeals in 71 N. Y. 502.

Wright v. Wright.

Mr. Thain, the attorney for Emma F. Wright, the plaintiff, on being applied to for an extension of time to answer, indorsed upon the extension a condition, that "no settlement be made without providing for the lien of plaintiff's attorney, of which notice is hereby given." Upon receipt of the extension with this condition, defendant's attorneys returned it and at the same time served their answer. Plaintiff recovered judgment and afterwards settled with defendant without providing for the lien of plaintiff's attorney.

Foster & Thomson, for appellant.

Alexander Thain, for respondent.

VAN HOESSEN, J.—This court decided, in *Pearl v. Robitschek* (2 Daly, 138), that a judgment debtor, who, in good faith, and with no intention to defraud the plaintiff's attorney of his costs, settles the judgment, is entitled to have the judgment record satisfied of record, notwithstanding the judgment creditor may not have paid his attorney's costs. To prevent a judgment debtor from paying both costs and damages to the judgment creditor, notice to him not to make such payment is indispensable. The notice may be either express or implied. In this case, no notice of any kind was ever given to the defendant. A sort of notice was given to his attorneys, for when they applied to Mr. Thain, the plaintiff's attorney, for an extension of the time to answer, he added to the proposed consent a written notice that no settlement could be made without providing for his lien as plaintiff's attorney in the action. That notice was returned by the defendant's attorneys to Mr. Thain without his being aware of its contents. There is no question, therefore, of the *bona fides* of the defendant in settling with the plaintiff; and the single point of inquiry is, Whether notice to the defendant's attorney of the existence of the plaintiff's attorney's lien is to be regarded as notice to the defendant. Rule 10 of the old Supreme Court provided that when an attorney has given notice of retainer, *all papers*

Consolidated Fruit Jar Company v. Mason.

in the course of the cause must be served upon him or his agent (Graham's Pr. 711). Section 417 of the Code provides that where a party shall have an attorney the service of papers shall be made upon the attorney, instead of the party. The papers referred to in the Code are, I think, papers in the course of the cause; papers pertaining to the proceedings of the court. A judgment debtor who settles with the judgment creditor after notice of the attorney's lien is justly deemed guilty of an attempt to defraud the attorney. In order to expose the party to such a liability, notice of the existence of the lien ought to be brought home to him personally. His position is not unlike that of a person against whom an injunction has been granted; he must be made aware that an injunction has been issued before he can be punished for its violation. In this case, it appears affirmatively that the defendant himself never had notice of the lien, and it would be inequitable to compel him to pay the judgment, or a large portion of it, a second time.

VAN BRUNT, J., concurred.

Order reversed, with ten dollars costs and disbursements.

CONSOLIDATED FRUIT JAR COMPANY, Respondent, *against*
JOHN L. MASON *et al.* Appellants.

(Decided February 5th, 1876.)

When a patentee in an agreement for the formation of a corporation, for a valuable consideration, transfers to the corporation his patent, and agrees that any extension of the patent shall be for the benefit of and belong to the corporation, and afterwards, while a trustee of the corporation, obtains a reassignment of the patent for the purpose of obtaining an extension, obtains an extension, but before doing so secretly grants to a third party a license to use and make the patented invention under the extension, and then assigns the extended patent to the corporation, such a grant is a violation of trust, a fraud upon the corporation, and the use of the license by the grantee, with notice, may be restrained by injunction.

By an agreement, otherwise valid, made prior to an application by a patentee for a

Consolidated Fruit Jar Company v. Mason.

renewal of his patent, a person may acquire from the patentee the right to such renewal when obtained, and such agreement is not in fraud of the law which allows such renewal only to the patentee.

A judgment in an equity case will not be reversed on account of the admission of irrelevant evidence on the trial, unless the appellate court is satisfied that the decision of the judge who heard the case was improperly affected by it.

APPEAL by the defendants from a judgment of this court entered on a decision made by Judge JOSEPH F. DALY, at special term.

The facts are stated in the opinion.

Frederick R. Coudert, for appellant John L. Mason.

F. J. Fithian, for appellant John K. Chase.

W. H. De Camp for appellant Henry F. Johnson.

Samuel G. Courtney, for respondent.

ROBINSON, J.—By virtue of an agreement dated December 12, 1871, executed by numerous parties thereto, the plaintiffs became the owners of two certain letters patent theretofore granted to the defendant John L. Mason (one of the parties to the agreement), one dated November 25th, 1858, and numbered 22,129, and the other dated November 30, 1858, and numbered 22,186, which extended for fourteen years from their respective dates. Said Mason therein covenanted, in consideration of \$5,000, then paid him by the plaintiffs, to use his influence and best efforts and services to procure renewals thereof for the benefit, and at the expense of the company; that to enable him to effect that object, plaintiffs subsequently, by instruments dated February 19th, 1872, re-assigned said letters patent to him; that his application, made at the expense of the company, was successful, and resulted in his procuring their renewals or extensions for further terms of seven years, to wit, from November 25th and 30th, 1872; that he subsequently, by assignments dated January 6th, 1873, assigned such renewals or extensions to the company. This controversy grows out of a license granted

VOL. VII.—5

Consolidated Fruit Jar Company v. Mason.

by said Mason to the defendant John K. Chase, bearing date November 30th, 1872, to use said invention for the full terms of the original patents and their several extensions, or any reissues of the same, which plaintiffs seek to have set aside as a fraud upon their rights. Mason discloses no consideration for the assignment by the company of those patents to him, otherwise than in aid of his covenant to procure such renewals or extensions, but contents himself with a denial that the plaintiffs, at the time of the granting by him to Chase of such license, had any rights, equities or interests in the extended patents; he fails to show how they had become divested of such interests. He concedes he paid nothing therefor, and that they were procured *for the purpose of enabling him to procure such extensions*. He asserts that he executed the license at the request of Boyd, the president of the plaintiffs' Board of Trustees, and it bears the name or signature of Mr. Boyd as a subscribing witness to its execution. He, as well as Boyd, were such trustees from the time of the formation of the company, and during all these transactions with it. Their duty under that relation precluded them from acting adversely to its interests, or acquiring benefits or advantages from secret purchases or other transactions to its prejudice, and it is manifest that the innovation upon the ownership and right to the exclusive use of these patents that was contemplated or made possible by that license was of a most serious character, being valued by Chase at \$100,000, and for which, in a new company, called the Standard Union Manufacturing Company, subsequently formed through Mason and Johnson's agency, he received \$20,000 of its stock.

The defendant Johnson made no defense on the trial beyond that presented by Mason, and the evidence clearly shows that he was merely used by Mason as a facile instrument to effect a fraud upon the plaintiffs by an ostensible purchase of the license from Chase for the benefit of Mason, to be secured through the formation of the new company. Whatever Mr. Boyd may have done towards promoting the execution of the license to Chase it is not shown, in any respect, that he had any authority from the Board of Trustees,

Consolidated Fruit Jar Company v. Mason.

or that his acts in that matter were ever authorized or sanctioned by the company. It was most probably procured by him in order that it might be held by Chase as trustee for the company and as a means of guarding against any treacherous refusal on the part of Mason to assign the extended patents; and the proof warrants this conclusion. Boyd and Mason being both trustees of the company, and acting without authority from the Board of Trustees or the company, were violating their trust in attempting an act so well calculated to be operated to its detriment, and to be used, as it has been, by designing and unscrupulous men to advance their private interest to its prejudice. The judge below well found that the execution and granting of this license to Chase was a fraud upon the company, either positive or constructive. It clearly appears it was without the authority or consent of their *cestui que trust* and an abuse of their duties as trustees (Story Eq. Jur. § 258). Neither Mason, Chase or Johnson make any exhibition of good faith or fair dealing in any of their acts with reference to this license; but they all appear to have been in covert hostility to the equitable rights fairly acquired by the plaintiffs in their original bargain with Mason.

Exceptions are not available as such in a court of equity. In *Forrest v. Forrest* (25 N. Y. 510) the Court of Appeals say: "Courts of equity, however, have been governed by very different principles from those of a court of law in granting or refusing new trials of issues of fact. Though evidence has been improperly admitted or rejected, if a court of equity was satisfied the verdict ought not to have been different, it would not grant a new trial upon mere technical grounds. Upon principles well settled, * * a new trial would not be granted * * unless for substantial errors showing that a fair trial has not been had, and *affording reasonable doubt as to the justice of the result.*" The only exception urged or pressed on the argument, was to the admission by the judge of the proceedings before the Commissioner of Patents on the procuring of these renewals, in which he made some unfavorable remark against the credibil-

Consolidated Fruit Jar Company v. Mason.

ity of Mason. It was so covered up under a mass of other matter that it would be difficult to regard it as having any weight with the judge, even if a specific objection and exception had been taken to the remark, which was not done, as the exception is one of a most general character and in no way points to any such exceptionable observation of the commissioner.

The findings of fact by the judge are fully sustained by the evidence. The right of the plaintiffs thus to acquire by preliminary covenant from the patentee the right to any renewals or extensions of those patents under existing laws of the United States, is fully recognized in its courts without imputation of the agreement being in fraud of the law allowing such extension only to the patentee. (Laws U. S., July 4, 1836, Brightley Dig. 734; *Hartshorn v. Day*, 19 How. 211; *Woodworth v. Sherman*, 3 Story, 171; *Washburn v. Gould*, id. 135; *Wilson v. Rousseau*, 4 How. 646; *Pitts v. Hall*, 3 Blatchf. 201; *Goodyear v. Cary*, 4 id. 271; *Clum v. Brewer*, 3 Curtis C. C. 506; *Nicholson Pavement Co. v. Jenkins*, 14 Wall. 452; *Thayer v. Wales*, 9 Blatchf. 170; *Ruggles v. Eddy*, 10 id. 52.) The judgment should be affirmed, with costs.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Judgment affirmed, with costs.

A motion for a reargument having been subsequently made, it was denied, and the following opinion was written:

ROBINSON, J.—The motion for a reargument is made solely by the defendant Mason. In the matter litigated his position was that of a trustee of the plaintiffs claiming benefits adverse to those of his *cestui que trust* through acts and dealings in which he was concerned, to wit, the granting of a license to one John K. Chase by one Boyd, a co-trustee and president of the Board of Trustees, but unauthorized by that body. Mason well knew or was charged with full

Consolidated Fruit Jar Company v. Mason.

knowledge of the character of that act, and owing "*uberrima fides*" to the company, was precluded in equity from availing himself of any benefit adverse to its interests through any of the transactions complained of, in which Boyd, Chase, and he participated. (Story Eq. Jur. § 321.)

The violation of his duty as such trustee and to his fiduciary relation to the company was clearly disclosed by the testimony. His want of truth in his statements as to any incidental matters arising in the case was of no especial consideration. Crediting all he says, his constructive fraud and breach of duty as a trustee to the interests of his *cestui que trust*, for whom he assumed to act, is patent and uncontroverted. His assumption to act and exercise adverse rights under the irregular and unauthorized license to Chase cannot be justified as against his duty to the plaintiffs. On the argument of the appeal, it was stated by the court that exceptions in an equity case had no such effect as strict exceptions taken on the trial of a suit at law. As to the latter, only such testimony as bear on the point under review are necessarily presented to the court, while in an equity cause the court sit as on an appeal under the civil law in review of the entire case, both as to the law and the facts, and are bound to consider and determine if, upon *the whole case*, any injustice has been done to the appellant by the rejection or admission of testimony that must have improperly influenced the judgment of the court below, or ought to lead to a different decision. The remarks of Ch. J. Church in *Norton v. Mallory* (63 N. Y. 433), "that there is no distinction between legal and equitable actions in respect to exceptions in respect to evidence," is clearly *obiter* and unnecessary to a decision of the case. It is contrary to a long line of decisions in the same court. (*Lansing v. Russell*, 2 N. Y. 563; *Forrest v. Forrest*, 25 N. Y. 510; *Ashley v. Marshall*, 29 N. Y. 503; *Rundle v. Allison*, 34 N. Y. 184; *In re Livingston*, id. 582; *Vandevoort v. Gould*, 36 N. Y. 644; *People v. The Waterford*, 37 N. Y. 2 Keyes, 332; *Foote v. Bryant*, 47 N. Y. 544.)

In *Tomlinson v. Miller* (3 Keyes, 520) the majority of the court expressly refused to sanction the distinction between

Oberwarth v. McLean.

exceptions taken on a trial of an issue out of a court of equity and those taken on a trial of such a cause before a single judge, or to give any greater effect to the latter. It is manifest that from the entire structure and functions of a court of equity the mere exception to the admission of evidence as irrelevant or immaterial, can be of no avail, since it is but received for ultimate consideration as to its bearing in any aspect of the case and its importance or relevancy is to be weighed by the judge. If he gives it undue weight and it improperly affects his judgment, the court, on appeal, having the whole merits of the controversy before it, can review and correct any such error; but as a strict exception to a matter presented on trial before a jury, the same reason for regarding the relevancy of evidence received does not pertain or prevail. I can perceive nothing offered as ground for reargument which in this case entitles it to any such further consideration. The motion for reargument should be denied, with costs and disbursements.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Motion for reargument denied, with costs and disbursements.

PAULINE OBERWARTH, Respondent, *against* JAMES
MCLEAN *et al.* Appellants.

(Decided March 6th, 1877.)

Under the Act of 1872 (L. 1872, c. 629, § 8), providing that a judgment of the Marine Court of the city of New York, for the sum of twenty-five dollars, or over, exclusive of costs, "the transcript whereof is docketed in the office of the clerk of the city and county of New York, shall have the same effect as a lien, and be enforced in the same manner as the judgments of the Court of Common Pleas for the city and county of New York;"—after a transcript of such a judgment has been so docketed an execution on the judgment must be issued from the Court of Common Pleas and cannot be issued from the Marine Court, and an execution theretofore issued out of the Marine Court, becomes upon the docketing of such

Oberwarth v. McLean.

transcript inoperative, and in case the judgment debtor's property is subsequently seized thereunder, the persons directing or joining in the seizure with knowledge of the docketing of the transcript, are liable as trespassers.

Quære, whether the marshal, if ignorant of the docketing of the transcript, would be protected as to his acts under the execution subsequent to the docketing.

The mere possession of personal property is sufficient to sustain an action for the wrongful taking of it by an officer acting under insufficient process, and he cannot defend his wrongful taking by attacking the title of the person from whose possession he took it.

APPEAL by the defendants from a judgment in favor of plaintiff.

The facts are stated in the opinion.

Reed & Drake, for the appellants.

Blumenstiel & Ascher, for the respondent.

JOSEPH F. DALY, J.—The defendants, who were co-partners, obtained a judgment for \$290 70 against I. L. Oberwarth, the plaintiff's husband, in the Marine Court of the city of New York, on February 13th, 1874. On the same day a transcript of the judgment was filed and the judgment docketed in the office of the clerk of the city and county of New York. On the same day an execution was issued out of the Marine Court, directed to one of the marshals of the city of New York, directing him to levy on the property of the judgment debtor to satisfy said judgment. Whether such execution was issued before the filing of the transcript with the county clerk does not appear. It does appear that the judgment was perfected in the Marine Court at 10.45 o'clock a.m., and the transcript was filed and judgment docketed in the county clerk's office at 11.03 a.m.

This action was brought to recover damages for the seizure and sale of property, alleged to belong to plaintiff, under that execution by the marshal. Defendants attempted to justify under that execution and judgment and to show that the judgment debtor had an interest, subject to levy and sale, in the property seized.

The court held that the transcript having been filed and

Oberwarth v. McLean.

judgment having been docketed in the county clerk's office, the judgment could only be enforced as a judgment of the Court of Common Pleas (L. 1872, c. 629, § 8), and that the execution out of the Marine Court did not protect the marshal or his indemnitors, these defendants; that the plaintiff was in possession of the goods seized at the time of seizure, and was entitled to recover; and left only the question of damages to the jury. A verdict for \$1,731 in plaintiff's favor was rendered and judgment thereon entered against defendants.

It can hardly make any difference whether the execution to the marshal was issued before or after the filing of the transcript, since the sale of plaintiff's property under it did not take place until afterwards. If the judgment creditor had the right after the passage of the Act of 1872 (*supra*) to enforce his judgment either by execution to a marshal, issuing out of the Marine Court, or by execution to the sheriff, issuing out of the Court of Common Pleas, these remedies were not concurrent; for although the execution to the marshal would reach personal property only, yet the execution to the sheriff reaches both personal and real property, and there could not possibly be an intention in the law that the two executions should issue at the same time. The right to the execution out of the Marine Court was immediate, but he was to make his election, and if he file a transcript of his judgment with the county clerk his election is made; the law declares that thereupon his judgment "shall be enforced in the same manner as judgments of the Court of Common Pleas" (act of 1872, *supra*), and we have held this mode of enforcement to be exclusive. (*Leland v. Smith*, 11 Abb. Pr. N. S. 231; *Ex parte Lippman*, 48 How. Pr. 359. See as to similar provisions respecting judgments of District Courts of the city of New York, *Martin v. Mayor*, &c. 12 Abb. Pr. 243.) This election is operative, although he may have already issued an execution out of the Marine Court—operative as to all subsequent proceedings to enforce the judgment. Thus, the judgment creditor might before filing a transcript have issued an execution out of the Marine Court

Oberwarth v. McLean.

under which the marshal acted ; and after such execution was returned wholly or partly unsatisfied, or after sale thereunder, he might file his transcript and issue execution to the sheriff. But he could not issue execution to the marshal after the transcript was filed, because the judgment is then enforceable only in the same manner as judgments of the Common Pleas ; and for the same reason the marshal could proceed no further upon an execution issued prior to such filing, for that would be in effect proceeding to enforce by execution out of the Marine Court to a marshal a judgment enforceable exclusively by execution out of the Common Pleas to the sheriff. As the plaintiff has the right in the first place to go on with his execution in the Marine Court, or to enlarge his power of enforcing his right by taking a step provided by the statute, his doing the latter, *i.e.* filing the transcript, must be held to supersede, or be an abandonment of his right to the execution in the Marine Court, and of such execution, if issued, and whatsoever there remained to be done by way of levy or sale under such execution, if issued, the filing of the transcript took from the plaintiff the right to authorize. The marshal, if proceeding in ignorance of the fact that a transcript had been filed, might be protected as to his subsequent acts under it ; but the plaintiff on whose behalf the transcript was filed, or other persons knowing the facts, would be liable for directing or authorizing the marshal to proceed.

As to the plaintiff's possession of the goods taken being undisputed, it is sufficient that they were in a store claimed by plaintiff as her own, and were taken from the store. The question as to whether she or her husband was the owner of the store relates to the *title*, with which the wrongdoer has nothing to do if he have, as in this case, no sufficient process to justify him.

The judgment should be affirmed with costs.

VAN BRUNT, J., concurred.

Judgment affirmed with costs.

Thompson v. Lumley.

LUCAS THOMPSON, Respondent, *against* ALEXANDER
LUMLEY *et al.* Appellants.

(Decided March 5th, 1877.)

Where an appeal is taken to the Court of Appeals, from an order granting a new trial, and that court affirms the order and directs judgment absolute on the stipulation given by the appellant, under § 11, subd. 2, of the (old) Code of Civil Procedure, all the traversable allegations of the pleadings of the successful party stand admitted.

Allegations of special damages are, however, not traversable, and consequently not thereby established, and the special damages alleged must still be established by evidence on an assessment of damages, had upon such order for judgment absolute in the court to which the case is remitted by the Court of Appeals.

In an action for malicious prosecution the amount of costs and counsel fees expended by the plaintiff, in defending the prosecution, is matter of special damage, and to be recovered, must be specially alleged and proved.

It seems, that an admission in a pleading that *about* \$700 was paid is not an admission of the payment of \$700, and that the party claiming to recover the amount so paid must show by evidence the precise amount.

It seems, that in actions for malicious prosecution, where the amount of the pecuniary equivalent for the plaintiff's loss of reputation and mental suffering, is not susceptible of exact proof, the plaintiff upon assessment of damages,—his cause of action being admitted,—is not required to give evidence of damage, but the jury may give such damages as they think the injury warrants including punitive damages; but if the plaintiff sees fit to give evidence as to such points, the defendant may controvert it. Per CHARLES P. DALY, Chief Justice.

It seems, that the defendant cannot, upon an assessment of damages, give evidence in mitigation of damages, where the direct effect of such evidence is to disprove the facts alleged by the traversable allegations of the complaint, and to show that no cause of action exists. Per CHARLES P. DALY, Chief Justice.

The rights of defendants, and the practice upon assessments of damages, in various classes of cases considered. Per CHARLES P. DALY, Chief Justice.

Where in an assessment of damages, in an action for malicious prosecution, the jury were erroneously instructed that an allegation of the complaint, as to the amount expended by the plaintiff, for costs and counsel fees, in defending the prosecution, stood admitted by the defendants, the court, on appeal, refused to allow the assessment to stand, upon the plaintiff's consenting to reduce the damages assessed by that amount, and ordered a reassessment, on the ground that the jury might have regarded the necessity of such expenditure, on the part of the plaintiff, as matter of aggravation, and on that account, given a greater sum, as general damage, than they otherwise would have done.

Thompson v. Lumley.

APPEAL by the defendants from an order made at special term, by Judge JOSEPH F. DALY, denying a motion to vacate an assessment of damages, and from the assessment had before Judge VAN BRUNT and a jury, and the judgment entered upon the assessment.

The action was brought in this court to recover damages for malicious prosecution, in charging the plaintiff, before a police justice, in New York city, with perjury, and causing his arrest by such justice on that charge, from which arrest the plaintiff, after a hearing before the justice, was discharged. At the trial, the complaint was dismissed. The plaintiff, Thompson, appealed to the general term, which ordered a new trial. The defendants thereupon appealed to the Court of Appeals, from the order granting a new trial, and stipulated (under § 11, subd. 2 of the Code of Civil Procedure—*old*), that if the order were affirmed, judgment absolute should be rendered against them. The Court of Appeals affirmed the order and ordered judgment absolute for the plaintiff, on the stipulation. On motion of the defendants the plaintiff's damages were ordered to be assessed before a judge of this court and a petit jury, and thereupon such an assessment was had before Judge VAN BRUNT and a jury.

In his complaint the plaintiff had alleged as special damages, that "he was compelled to pay about seven hundred dollars, in costs and counsel fees, in defending himself against the defendants' prosecution." At the assessment of damages Judge VAN BRUNT ruled that the plaintiff need give no evidence as to the actual amount so paid, and that the judgment of the Court of Appeals established that the plaintiff did spend \$700 in costs and counsel fees, for defending himself.

The damages were assessed at \$3,200.

C. Bainbridge Smith, for appellants.

A. J. Requier, for respondent.

Thompson v. Lumley.

CHARLES P. DALY, Chief Justice.—This was an action to recover damages for a malicious prosecution. Upon the trial, the complaint was dismissed. The plaintiff appealed to this court, and the general term granted a new trial. The defendants then appealed to the Court of Appeals, where the decision of the general term was affirmed, and upon the stipulation entered into by the appellants, judgment absolute was rendered for the plaintiff. The cause was then remitted to this court, where all that remained to be done, was to ascertain the plaintiff's damages, he having in addition to his general damages, averred in his complaint special damages, one item of which was, that he had been compelled to pay about seven hundred dollars in costs and counsel fees. The effect of rendering judgment absolute in his favor, was to establish fully his cause of action, leaving nothing to be ascertained but his damages; to hold, as he averred, that the defendants maliciously intending to injure him in his good reputation and without probable cause, charged him before a magistrate with having committed willful and corrupt perjury; that they procured the magistrate to grant a warrant for his arrest upon that charge, upon which warrant he was arrested and imprisoned for several hours, when he gave bail; and that afterwards, upon an examination before the magistrate, he was fully acquitted upon the testimony of the prosecution.

The effect of the judgment of the Court of Appeals was the same as if the whole of the plaintiff's cause of action had been admitted. It was equivalent to an admission, by a failure to put in an answer, that the defendants had maliciously and without probable cause, caused the plaintiff to be arrested, imprisoned and prosecuted upon a charge of perjury. But the amount paid for counsel fees and costs, the plaintiff had to prove upon the assessment, for that was in no way settled by the judgment of the Court of Appeals, the effect of which was simply to establish the plaintiff's cause of action as averred in his complaint, but nothing more; and the ruling of the judge upon this point was, in my opinion, erroneous.

The averment that he was compelled to pay "about seven

Thompson v. Lumley.

hundred dollars," was an averment of special damage; and an averment of special damage is not traversable, unless where it is the gist of the action. (*Baldwin v. N. Y. &c. Nav. Co.* 4 Daly, 315; Chitty on Pleading, 646, 6th Am. Ed.; *Smith v. Thomas*, 2 B. N. C. 372; 2 Scott, 546; *Welby v. Elston*, 8 M. Gr. & Scott, 142; *Robinson v. Marchant*, 7 Q. B. 918.) "If," said Ch.-J. Tindall, in *Smith v. Thomas* (*supra*), "the plaintiff proves his special damage, he may recover it; if he fails in proving it, he may still resort to and recover his general damages. A traverse, therefore, if such an allegation is immaterial and improper as a finding upon it either way, will have no effect as to the right to the verdict." The damages sustained are, as a general rule, matter of evidence, and need not be alleged (*Barruso v. Madan*, 2 Johns. R. 149); but where the plaintiff seeks to recover damages which were not the direct and immediate result of the injury, and which the defendant therefore cannot be assumed to have any knowledge of, the plaintiff must aver them specially in his complaint, that the defendant may not be taken by surprise upon the trial, but may be prepared to rebut the proof offered of such special damages, or the amount, or extent of them. (*Sqund v. Gould*, 14 Wend. 160; *Vanderslice v. Newton*, 4 N. Y. 132, 133.) The object is merely to give him notice, that he may not be taken by surprise, and therefore such an averment is not traversable or demurrable. (*Leland v. Tousey*, 6 Hill, 328.) A failure to answer, consequently, is no admission of such special damages, and the plaintiff must prove them on the assessment.

Even if an expense incurred in consequence of the injury is, as Judge Pratt said—but without supporting it by any authority—in *De Forest v. Leete* (16 Johns. 128), "a material and traversable fact," it would not avail in the present case, where the averment is not that \$700 was paid, but *about* that amount, making it still necessary for the plaintiff to show, upon the assessment, what sum was paid.

The complaint also averred, as an additional damage, that the plaintiff had suffered in his business, especially among those who believed him guilty, and who refused to deal with

Thompson v. Lumley.

him, and also greatly in his peace of mind, and he claimed in all \$50,000 damages.

The appellants insist that under this averment the plaintiff could recover only nominal damages; and that, if he sought to recover any more, he would have to prove them. But this is not the rule. In actions of this nature, where the injury done to a man's reputation by his being arrested and imprisoned upon such a charge, and the mental suffering which is incident to it, is incapable of exact proof as is an ordinary pecuniary injury to property; the plaintiff upon an assessment of damages;—his cause of action being admitted, is not required to give any evidence of damage, but the jury may give such damages as they think the nature of the injury warrants, and which, unless excessive, will not be disturbed. (*Tripp v. Thomas*, 3 Barn. & Cresw. 427; *id.* 5 Dow. & Ry. 276; *Pierpoint v. Shapland*, 1 Car. & Payne, 447; *Tillottson v. Cheetham*, 3 Johns. 56; 1 Tidd's Pract. 581, 9th Lond. Edit.; Townshend on Slander and Libel, § 274.)

As respects the assessment of damages in this case, it is to be regarded as analogous to the case of a default upon a failure to answer, and to be governed by the practice which existed upon assessing damages upon an inquest at the circuit or upon a writ of inquiry before a sheriff's jury. •

It was held in *Green v. Willis* (1 Wend. 78), that upon an inquest, the defendant loses his right to challenge the jury or to produce testimony, and examine witnesses on his behalf;—that he is entitled to appear; to cross-examine the plaintiff's witnesses; to raise objections to the plaintiff's right of recovery, and to take exceptions to the decisions and opinions of the judge, and it was in respect to the practice, as it has existed since the decision of this case, in 1828, that I remarked upon the argument in the present case, that so far as my knowledge extended, it had not been the practice to allow the defendant to call witnesses.

In *Tillottson v. Cheetham* (*supra*), Spencer, J., said in effect, that the defendant was entitled to give evidence, to mitigate the damages in action of libel; that the plaintiff, in consequence of the default, was entitled to nominal dam-

ages, and that, as respects the real damages, the defendant was at liberty to urge to the jury that the inuendoes in the declaration were not warranted by the context. But this was a dissenting opinion; the majority of the court holding that upon the default, the fact of the publication of the libel and the truth of the inuendoes were admitted.

It has been said, moreover, in other cases, that where the cause of action was admitted by the default and the sum which the plaintiff was entitled to recover was uncertain, that the defendant was at liberty to give evidence upon that point. (*De Gaillon v. l'Aigle*, 1 Bos. & Pul. 368; *Sheperd v. Charter*, 4 Term Rep. 275; *Thellusson v. Fletcher*, Doug. 317; *Dunlap's Pr.* 395.)

In *Gilbert v. Rounds* (14 How. Pr. 46), which was an action for an assault and battery, it is said by Balcom, J., that where a party allows an inquest to be taken against him at a circuit, there is authority for saying that he thereby loses the right to produce testimony and examine witnesses on his part; and is restricted to the right of cross-examining plaintiff's witnesses; but that he was unable to find any authority, that the defendant's rights were so restricted on the assessment of damages, either at the circuit, or before a sheriff's jury, when judgment goes against him for not answering the complaint. This distinction may be entirely true, so far as it is applied to the assessment of damages in an action for assault and battery; for in such an action, if the plaintiff, upon the defendant's failure to answer, gives no proof of the nature of the injury which he suffered, but relies simply upon the defendant's admission of an assault and battery, the plaintiff can recover only nominal damages (*Bates v. Loomis*, 5 Wend. 134); for unless the circumstances of the assault and battery are proved, the jury have no means of judging what damages beyond nominal damages they ought to give.

In *Saltus v. Kipp* (12 How. Pr. 342), which was also an action for assault and battery, Bosworth, J., says; "A defendant may call witnesses on the assessment of damages upon a writ of inquiry and prove any matter which goes

Thompson v. Lumley.

only to mitigate damages. *Lane v. Gilbert* (9 How. Pr. 150) and *Hayes v. Berryman* (6 Bosw. 679) are to the same effect, and it may accordingly be assumed that in the assessment of damages, in actions of assault and battery, or in any action where the plaintiff, unless he is content with nominal damages, must prove the circumstances to enable the jury to judge what damages they ought to give; the defendant may call witnesses to show mitigating circumstances, or give any evidence which may aid the jury in fixing a just and adequate amount. But in actions for defamation or malicious prosecution, where the injury is to reputation and character, the jury, where the cause of action is admitted, are enabled to judge from the defamatory words, or the nature of the charge upon which the defendant was arrested and prosecuted, what damages ought to be given (*Tripp v. Thomas, supra*); but if the plaintiff, upon the assessment, is unwilling to leave the case with the jury upon the charge alone, but calls witnesses to prove all the facts and circumstances, then the defendant is equally entitled to call witnesses as to the facts and circumstances, controverting such as may be so proved; for whatever the plaintiff may prove, the defendant is at liberty to disprove (per Hogeboom, J., in *McKown v. Hunter*, 30 N. Y. 628). The plaintiff gave evidence of this description, such as that he was taken through the city to Jefferson market; that he was extremely harassed and worried; that he did not know what the effect might be upon his business; that he did not attend to his business as usual, being harassed and worried by this prosecution, which lasted a little over four months; that he was very much excited over it, and very much hurt in his feelings; that he had to attend the court from fifteen to twenty times, some days staying only a very short time, whilst some days the sittings were quite long. He also proved that an account of his arrest was published in two of the newspapers of the city of New York, the *Tribune* and the *World*, the account contained in both papers being read to the jury, to which the defendant excepted. The defendants asked the judge to charge that the jury had no right to infer that any copies of

Thompson v. Lumley.

the newspapers were circulated, and he so charged. The further request that there was no evidence that a copy of the papers containing the publication was ever circulated in the city of New York, he refused and properly;—what he had already charged being sufficient. The defendant excepted to the plaintiff being asked what was the effect upon his mind and feelings, if any. But this inquiry was certainly competent, for the mental suffering arising from being arrested and prosecuted upon such a charge, is undoubtedly a part of the injury, and may be taken into consideration by the jury in adjusting what they may regard as compensatory damages. The defendant also took exception to plaintiff being asked what was the extent of his business; but although the question was allowed it was not answered, which disposes of this exception. The exception to the plaintiff showing that an account of his arrest was published in the newspapers was not well taken. The newspapers are allowed by statute (Laws of 1854, chap. 130) to publish an account of the proceedings in the courts, and the injury to the plaintiff's reputation would be augmented through the legitimate publicity given thereby to the fact of his arrest and prosecution, upon a charge of perjury.

So far as the plaintiff gave evidence of facts and circumstances, tending to enhance the amount of damages, the defendants were entitled to give evidence to controvert any of those facts and circumstances. With that view, they subjected the plaintiff to a very long cross-examination; and in addition, attempted to get before the jury the whole case as it was presented on the trial, before Judge Larremore, when the complaint was dismissed; and also proposed to show that all the facts came up upon a motion to discharge the order of arrest before Judge Joseph F. Daly, and that he virtually rendered the same decision as Judge Larremore. All this testimony was objected to and excluded, the defendants taking a great number of exceptions which I do not propose to consider, as I shall pass upon those exceptions only which the defendants present in their points, and which their counsel have argued before us, at the general term,

Thompson v. Lumley.

assuming that he regards all the other exceptions as untenable. It will suffice to say, in respect to the attempt to introduce the whole of the case, as it was presented upon the trial, when the complaint was dismissed, that it is well settled that the right of a defendant upon an inquest does not extend so far as to allow him to introduce what would be a substantial defense to the action. (*Hartness v. Boyd*, 5 Wend. 563; *Paige v. Willett*, 38 N. Y. 31; *Tell v. Beyer*, id. 162.) The defendants were entitled to controvert any of the evidence given by the plaintiff to enhance the damages; to disprove, by calling witnesses, any of the facts and circumstances he gave in evidence for that purpose. But the defendants undertook to go much further than this. They claimed the right to introduce independent testimony, the direct tendency of which was to show the existence of probable cause, when the decision in the Court of Appeals was a final adjudication that the charge was maliciously made, without probable cause; which brings under review the specific exceptions upon which the defendants rely and have argued before us. They claimed the right to prove by the evidence of their counsel, Mr. C. B. Smith, that they consulted with him with reference to making the complaint before the criminal magistrate; what he, Smith, advised; what facts and circumstances he had before him; whether or not, on the strength of these facts and circumstances, and his personal acquaintance with the facts and circumstances, he advised the making of the complaint; whether Alexander Lumley, one of the defendants, acted upon his, Smith's, advice in making it; and Mr. Smith was also asked to state in detail why, if he did so, he advised that the criminal charge would be upheld. They also offered to show that the defendants took the affidavit and submitted it to the district attorney; and that he, the district attorney, thought it was a proper case to bring before a criminal magistrate; and they put one of the defendants upon the stand and claimed the right to ask him how he came to make the complaint before Judge Cox; what professional judgment, if any, Mr. Smith gave him in respect to whether it could or

Thompson v. Lumley.

could not be sustained ; whether he knew or not, before the complaint was actually made, that the district attorney had approved of the making of such a complaint ; whether he, the witness, had any malice in his heart against the plaintiff in making it ; and whether he did or did not believe at the time he made it that the plaintiff was really guilty of the crime of perjury. All of which questions and offers of testimony were excluded by the judge below. The defendants insisted in their argument before us, that they were entitled to give this evidence in mitigation of damages ; but the objection to the whole of it is, that the direct tendency of it was, to show the existence of probable cause, or to give, in mitigation of damages, what was in reality a defense to the action. The judge below, under the decision of the Court of Appeals, had a right to assume that it was finally adjudged and fixed that the charge was made maliciously and without probable cause, and that that could not be controverted, whether for the purpose of mitigating damages or otherwise. It would be, in fact, allowing the defendants to prove that there was no cause of action, as a ground for mitigating the damages.

In *Foster v. Smith* (10 Wend. 377), which was an assessment of damages by a writ of inquiry, after default, in an action for false imprisonment, it was held that evidence denying the cause of action, or tending to show that no right of action existed, was inadmissible in mitigation of damages ; that damages in such a case must be assessed on the assumption that the trespass complained of has been committed. Nor were the defendants entitled to ask the defendant who made the complaint, whether he had any malice in his heart against the plaintiff, in making it. Malice, in an action of this nature, is what is termed *malice in law* ; that is, doing a thing intentionally without any lawful right or authority. The existence of *actual* malice, however, may be shown to enhance the damages ; and where any such evidence is given, such a question as the one asked might be put to disprove the existence of actual malice. No evidence of this kind, however, was offered by the plaintiff, and

Thompson v. Lumley.

there was therefore no foundation for this question. The defendants excepted to the judge's instructing the jury that they might give punitive damages. The judge told the jury that they had the right, in this case, to give punitive damages, because the judgment of the Court of Appeals was, that this prosecution was malicious; that the amount of damages, if they came to the conclusion of giving punitive damages, was entirely within their discretion; that they had a right to give such damages or not as they might think the public interest requires; that it was for the punishment of the party, in a case of this description, that such damages were allowable, and they were given as a warning to others, and to prevent a repetition of the act. It is claimed that this was instructing the jury that they might give exemplary damages against the defendants, when the judge had refused to permit the defendants to give evidence tending to exculpation; that this was error; and we are referred to the case of *Millard v. Brown* (35 N. Y. 297). That, however, was an action for negligence, where, as the court said, the right of the jury to give exemplary damages depended upon whether the negligence was of such a character as to amount to misconduct or recklessness; and the court reversed the judgment, because the judge told the jury that they might give exemplary damages, if the defendant had been guilty of gross negligence, in leaving the cellar in an exposed and dangerous condition, whilst he precluded the defendant from showing that the hole was dug for the purpose of putting up a building, the cellar of which was to extend under the side-walk, and that the delay in putting it up was unavoidable, on account of certain legal proceedings to settle the boundary line, the only evidence in the case, as would seem from the report, of gross negligence, being that the fence which guarded the side-walk, was after its erection thrown down, and that the same remained open for several months, until the happening of the injury. The error, so far as it can be gathered from the opinion of the court, was in precluding the defendant from showing that the excavation was lawfully made.

Thompson v. Lumley.

In certain actions the right to give punitive damages does not necessarily result from the nature of the action ; as in actions for injury to property, unless actual malice, gross misconduct, recklessness, or something of that kind is shown. But in other actions, such as for defamation, seduction, malicious prosecution, etc., the right of the jury, in their discretion to impose what is variously called "smart money," "punitive," "vindictive" or "exemplary" damages, seem to follow from the very nature of the injury. Thus Ch. J. Wilmot said, in an action of seduction: "Actions of this sort are brought for example' sake, and although the plaintiff's loss in the case may not amount to the value of twenty shillings, yet the jury have done right in giving liberal damages." In an action like the present, where it has been adjudged that the defendants maliciously, without probable cause, had the defendant arrested and prosecuted upon a charge of perjury, the right on the part of the jury, in their discretion, to give punitive damages, I think, follows from the nature of the injury. A reassessment will, however, have to be ordered for the error before referred to, of holding that the judgment of the Court of Appeals established that the plaintiff might recover for the amount averred to have been paid for counsel fees, etc., and that the plaintiff was not required to prove what he had paid.

ROBINSON and LARREMORE, JJ., concurred.

Reassessment ordered.

Upon an application being subsequently made to the general term by the plaintiff to have the judgment reduced by deducting the amount of \$700 expenditures in defending the malicious action and affirmed as to the remainder, the following opinion was delivered on June 7th, 1877 :

ROBINSON, J.—While the plaintiff's application might be granted were this an action founded on contract, where the damages may be made matter of just estimate and calculation upon principles established by the court, no such rule can be

Thompson v. Lumley.

applied to actions in tort, wherein the amount of damages are within the discretion of the jury, and are to be assessed by them upon their estimate of the compensation to be awarded or damages in matters of a positive character for wrong done and in respect to which no precise measure of damages can otherwise be established. In the case under consideration the only ground for reversal maintained by the general term in an action for malicious prosecution, was in the error of the judge in positively allowing an averment of an expenditure of "about seven hundred dollars" in defending the malicious action, undenied as an admission of an expenditure to that amount for that purpose."

Were this an action founded solely on contract or upon matters of mere pecuniary obligation, the consent of the plaintiff to deduct the sum from the recovery would be just and proper, and relieve the court from the necessity of a new trial; but the present case being an action for tort it is impossible to adjudge that precise sum as having controlled the jury in their assessment of plaintiff's damages. It may well be that in the making of that assessment they may have regarded the necessity on the part of the plaintiff in incurring any such an expense, as matter of aggravation, enhancing the damages to an amount such as they would not otherwise have given; and it is impossible to enter into the minds of the jury and determine the extent of the consideration they gave to the circumstances calling for this expenditure.

The motion of the plaintiff to reduce the recovery by this amount should be denied, with costs.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Motion denied, with costs.

Royce v. Watrous.

**HENRY ROYCE, Respondent, *against* CHARLES WATROUS
et al. Appellants.**

(Decided March 5th, 1877.)

Where, upon the plaintiff's motion, a verdict has been directed against the defendant, to which the defendant has excepted, the facts to be considered in determining the propriety of that direction, are those specifically proven by the evidence for the defendant and those which may be reasonably inferred from that evidence, and if such facts contradict plaintiff's evidence and constitute a defense, the question of fact should be submitted to the jury.

It is a defense to an action by a vendee for damages for non-delivery, that the vendee and a confederate were engaged in the attempt to obtain the sale and delivery of the goods for promissory notes of a third party known to them to be worthless, although the vendor, who discovered the fraud during the attempt, allowed the sale but not the delivery to be consummated, and with the intent only of securing possession of the notes as evidence of attempted fraud;—if such vendor at the trial tenders back the worthless notes.

Appeal by the defendants from a judgment of this court entered upon a verdict for plaintiff, directed by Judge JOSEPH F. DALY, at trial term, and from an order made by him, denying a motion for new trial.

The facts are stated in the opinions.

Sheldon & Brown, for appellants.

Douglass Campbell, for respondent.

CHARLES P. DALY, Ch. J.—In my opinion this was a case for the jury. As the plaintiff Royce was contradicted in the most material parts of his statement of what occurred between himself and the defendants, the jury were entitled, if they believed the defendants' testimony, to discredit the whole of Royce's evidence; to disbelieve his statement that he bought the notes of Van Horne at a discount of 10 per cent., agreeing to pay for them out of commissions to be thereafter earned upon sales of lumber which he might make for Van Horne. Disbelieving his statement in this respect, the jury would have been warranted in concluding that the

Royce v. Watrous.

whole transaction was a contrivance by Van Horne to get lumber for Farnham's notes, Van Horne knowing that Farnham was embarrassed, and that his notes would not be paid when they matured; in carrying out which scheme, Royce, who was Van Horne's clerk, and irresponsible, acted as Van Horne's instrument.

The judge having ordered a verdict for the plaintiff, he must be regarded as ruling that the plaintiff was entitled to recover, even upon the case as presented by the defendants' testimony, and in view of any inferences which a jury might legitimately draw from the defendants' testimony, or from the whole of the evidence in the case.

The case, as presented by the evidence, assuming Royce's testimony to be untrue wherever he is contradicted by the defendants' witnesses, discloses this state of facts. Van Horne held three notes of Farnham's which had not matured, and knew that Farnham was embarrassed; the fact being that Farnham had then stopped payment and his notes had been protested. Royce was Van Horne's clerk, at a salary of \$20 a week, with commissions upon any lumber he might sell for his employer, and was an irresponsible person, being unable to pay his debts. Royce, who was wholly unknown to the defendants, came to their lumber yard on Oct. 4th, 1875, at about 8 o'clock in the morning, and inquired for certain kinds of lumber, which were shown to him, and the prices stated, to which he made no objection. He asked the defendant Wilson if he would take Farnham's notes in payment, and Wilson answered, that if Farnham came there to buy lumber he would take his notes in payment, but this was an irregular proceeding, and he should want to inquire further. He asked Royce how he came to buy the notes, and Royce answered, that Farnham was indebted to him for lumber which he had sold to him, and that he would give him (Royce) his notes in settlement. Wilson then asked Royce his name; and upon hearing it, said: "I thought you were a clerk of Van Horne's." Royce answered: "No, I have not anything to do with him." Wilson replied: "You were in Albany, buying lumber with him." To which Royce

Royce v. Watrous.

answered : " That was a mere friendly act ; I went up there and assisted him, and he paid my expenses." Wilson then asked him what he wanted with the lumber, upon which he said : " I am buying and selling on commission ; that is my business ; I have a customer for this lumber." Wilson then told him he would inquire further and then let him know. Royce came again in the afternoon, but Wilson, not having made the inquiry, or, as he testified, not having had a report, Royce went away. On the same day, the 4th of October, Van Horne called upon Farnham, said he was in quite a hurry, and wanted him to exchange the notes that he, Van Horne, held, and give him other notes, extending the time of payment ; that he wished to send them to the West, and to make them payable to H. Royce (the plaintiff), who was not known to Farnham, and that he, Van Horne, would surrender the other notes, the effect of which would be to give him, Farnham, more time to pay the notes. The two new notes, to the plaintiff's order, were accordingly given as requested, one of them being dated on that day, October 4th, and the other dated back September 15th. Van Horne then went away with the notes, but did not surrender the old ones, which he still holds.

Before Royce came for the last time, on October 4th, Wilson had made inquiries, and learned that Royce's statement, that the notes were for lumber for which Farnham owed him, was untrue, and also the falsity of his statement that Farnham was good. Wilson, finding that the object of Royce was to defraud him, by obtaining the lumber by false representations, took the two notes, being the notes which Van Horne had the same day obtained from Farnham, leaving Royce under the impression that the lumber would be delivered to him, but took them for the purpose of bringing the matter before a criminal court, Farnham having sent to him a request that the notes should be taken from Royce, and not used ; and the next day Wilson laid the matter before Judge Kilbreath, deposited the notes with him, and on the facts stated, Judge Kilbreath issued a warrant for Royce's arrest upon a criminal complaint, and the papers,

Royce v. Watrous.

with the notes passed into the hands of the district attorney, in whose hands they appear to have remained until the trial in the Court of Sessions, the plaintiff having afterwards been prosecuted, and a trial had, upon a criminal charge, before Judge Sutherland, upon which trial he was acquitted.*

The jury, I think, would have been warranted upon this evidence in concluding that Royce and Van Horne had confederated together to defraud the defendants out of the lumber, by giving in payment for it notes which Van Horne knew would not be paid, and that Wilson, in taking the notes, after being fully advised of the fraud which was intended to be practised upon him, did not take them in payment for the lumber, or as the consummation of a contract for the sale of it; but because he erroneously supposed that Royce would be liable to a criminal prosecution for the attempt to commit a fraud, which was not consummated, as the lumber was not, and never was meant to be, delivered. It was not, in my judgment, a contract made by the delivery of the notes, as the intent of Royce in giving them, or more correctly the mutual design of Van Horne and Royce, was, by their delivery, to perpetrate a fraud upon the defendants; and the intention of Wilson, in taking them with the full knowledge of the fraud that was contemplated, was not to make a contract for the delivery of the lumber, but to get them into his possession, at Farnham's request, as evidence upon which to found a criminal complaint against Royce.

Where a party has been induced by fraudulent representations to make a contract of sale, and has delivered the property sold to the fraudulent vendee, receiving from him notes of a third person in payment of the amount, he cannot rescind the contract and sue the vendee for the goods sold, without returning or offering to him the notes (*Baker v. Robbins*, 2 Denio, 136); but in frauds of this kind, where nothing is parted with by the fraudulent vendee but his own promissory notes, such return or offer to return before suit brought,

* On the trial in this court the notes were produced by the defendants and tendered to the plaintiff.

Royce v. Watrous.

is not necessary ; it is enough if the notes are produced upon the trial, ready to be canceled (*Nichols v. Michael*, 23 N. Y. 267), the principle or rule being, that in case any money or property has been received under the contract, the money or property thus received must be restored before there can be any disaffirmance of the contract ; because a party cannot both repudiate a contract and at the same time insist upon retaining its fruits or benefits. (Per HOGBOOM, J., in *White v. Dodds*, 42 Barb. 561.)

This was not a case, however, in which a vendor seeks to rescind a contract upon the discovery afterwards of the fraud, but in which the alleged fraudulent vendee brings an action to recover damages for the non-delivery of the goods, and if, as the jury may have found, his design, and that of his employer, was to cheat and defraud the defendants, it is nevertheless claimed that the action may be maintained, because the defendants took the notes, and did not offer to return them until the day of the trial. In my opinion, a tender or offer of them upon the trial, in such a case, was sufficient. The defendants were not asking to enforce any right. They were brought into court by a fraudulent vendee to recover damages from them, because they would not deliver the goods when they knew before delivery that his design was to defraud them. In such a case, it is not inapt to quote the language of Beardsley, J., in *Masson v. Bovet* (1 Denio, 74), in respect to the rule that what has been received by the defrauded party should be returned. He says : " This is not exacted on account of any feeling of partiality or regard for the fraudulent party. The law cares very little what his loss may be and exacts nothing for his sake. If, therefore, he so entangles himself in his own knavish plot that the party defrauded cannot unloose him, the fault is his own ; and the law only requires the injured party to restore what he has received, and, as far as he can, undo what has been done in the execution of the contract. This is all that the party defrauded can do, and all that honesty and fair dealing requires of him. If these fail to extricate the wrong-doer from the position he has assumed in the execution of the contract, it is in no sense the fault of his in-

Royce v. Watrous.

tended victim; and upon the principles of eternal justice, whatever consequences may follow, they should fall on the head of the offender alone."

The defendants erroneously conceived when they took these notes that they were discharging a public duty, by getting into their possession the evidence of what they supposed to be a criminal offence; and the fact that they did so, shows that there was no intention on their part to make a contract. The fact that they made a complaint before a criminal magistrate the following day, and had the plaintiff arrested; placing the notes in the hands of the magistrate, was an immediate and direct repudiation of any contract, of which the plaintiff was fully advised; and will the law, under such circumstances, make a contract for them? Nothing is better settled than that no title passes where the vendee, by means of fraudulent representations, with intent to cheat the vendor, obtains goods upon credit, giving his own notes, or the notes of others equally valueless, in payment. (Hilliard on Sales, pp. 432, 435, 436, 3d Ed.) It is at the election of the vendor, if he thinks proper, to hold him to the contract; but the whole transaction being void *ab initio* as respects the vendee, the vendor may recover back his property, upon returning or offering to return what he has received. But, as I have said, this is not such a case. It is an action brought to recover damages for the non-delivery of the goods, by a party who never acquired any title to them, if, as the jury may have found, his design was to cheat and defraud the defendants;—to induce them, by fraudulent representations, to part with their property for notes which he knew could not be paid.

Intending to defraud, what right could he have to bring an action for damages because he did not succeed in his scheme; and if he brings such an action, what right would he have to complain, if, upon the trial, the instruments with which he meant to defraud are given back to him. Both he and the maker of the notes are insolvent, and were so when the notes were made; and as respects Van Horne, who obtained them, the notes are past due, and Van Horne holds

Royce v. Watrous.

the original notes of which they were a renewal, never having, as he promised, surrendered the former ones to Farnham. The original notes, which are greater in amount than the two notes given in renewal, are still in Van Horne's possession, and Farnham remains liable upon them, the notes given in extension having matured. Farnham, in fact, is the only one that could be injured, by having given two sets of notes for the same amount. But he makes no complaint. On the contrary, it was at his request that the defendant took these two notes from the plaintiff.

The reason of the rule, that a defrauded vendor must return or offer to return the note of a third person, where he means, upon discovering the fraud, to rescind the contract, is that the vendee may have whatever benefit he may derive from the repossession of the note, the vendor having elected to repudiate the contract, which repudiation gives him the right to repossess himself of his goods, unless they have passed into the hands of an innocent holder for value. This reason does not apply in this case; for the vendee, Royce, was in as good a position when the notes were offered to him on the trial, as he would have been if they had been returned to him before he brought the action;—for the maker of the notes, Farnham, was insolvent when he gave them, at Van Horne's request, and the notes have never since been collectible. Farnham swore expressly that they had never been collectible since they were made, and were not then, on the day of the trial, worth anything. The plaintiff, therefore, as I have said, was in as good a position when the notes were offered to him at the trial as he could have been by the possession of them at any time previously; and, in my opinion, a tender of them then was sufficient, and accomplished every purpose which the law has in view in requiring the vendor to return what he has received. In *Duval v. Mowry* (6 R. I. 479), which was an action of trover, it was distinctly held, where the acceptances of a third person had been received by the defrauded vendor, that a tender upon the trial was sufficient, the drafts being overdue and worthless by the insolvency both of the vendee and of the acceptors, and that

Royce v. Watrous.

in such a case to require a tender before suit brought, would, to be exact, be an idle and useless ceremony. (And see to the same effect *Thurston v. Blanchard*, 22 Pick. 18; *Poor v. Woodburn*, 25 Vt. 234.)

The case derives no additional weight from the fact that money was deposited by Royce in the hands of the paying teller of the bank, who was an acquaintance of Royce's, for the payment of the notes, had they been presented for payment when due, being payable at the bank. Van Horne and Royce knew very well that they would not be presented, the notes being then in the possession of the criminal authorities. The money was not deposited in the bank to the credit of Farnham, the maker of the notes; for if it had, it might have been applied to their payment. Nor was it deposited to Royce's credit, but simply put in the hands of the paying teller, who was an acquaintance, as an ingenious contrivance to show that it was the design of Royce, as the indorser, to pay the notes when they fell due, which he or Van Horne knew very well might be safely done, there being no probability of the notes being presented, when they matured, at the bank for payment in the ordinary course of business. In any aspect of this case I think it was a case for the jury. Their finding might not have been conclusive, but I do not think that the court could take it away from them and hold, as matter of law upon the evidence, that the plaintiff was entitled to recover. I think, therefore, that there should be a new trial.

LARREMORE, J.—I concur with the chief justice in ordering a new trial in this action. When the notes in dispute were given, and up to the date of trial, Farnham (the maker thereof) was insolvent; and plaintiff when he indorsed them "*was not worth anything.*" *Prima facie*, upon the testimony of both maker and indorser, the notes were worthless, and the tender of them upon the trial, in a suit by the indorser *as vendee* to recover damages for breach of the contract for which said notes were given, was, in my judgment, a substantial compliance with the law. The relations that existed between the plaintiff and Van Horne; the

Rae v. Harteau.

representations and negotiations by the latter in obtaining the notes, taken in connection with Farnham's testimony, raised a question as to the good faith of the transaction, the determination of which should have been left to the jury.

ROBINSON, J., dissented, on the grounds that the plaintiff's representations had not been relied on by the defendants, and that the defendants had not offered or proposed to rescind the contract or return the notes except on the trial. and also on the ground that there was no evidence upon which the plaintiff could be held responsible for any false representation of any material fact.

Judgment reversed. *

WILLIAM N. RAE, Respondent, *against* HENRY HARTEAU
et al. Appellants.

(Decided March 5th, 1877.)

The notice of entry of judgment of affirmance, required by sec. 348 of the (old) Code of Civil Procedure § to be served upon the adverse party ten days before bringing suit upon an undertaking upon appeal, must be a written notice that there has been an entry of a perfected judgment. The statute must be strictly complied with, and the service of a paper purporting to be a copy of an order of affirmance, without any notice that it has been signed or entered, is insufficient, and an action upon the undertaking cannot be sustained upon proof of service of such an order ten days before suit.

Failure of proof of such notice cannot be supplied by showing that the defendant in the original suit, without waiting for notice of entry of the judgment, moved under L. 1871, c. 282, § 8, for a certificate to enable him to go to the Court of Appeals, nor by showing that the sureties, when demand of payment was made on them, did not base their refusal to pay on the failure to serve such notice.

The fact that sureties on an undertaking on appeal have been indemnified, does not estop them in a suit on the undertaking from insisting on proof of performance of all the conditions required by the statute precedent to a suit on it.

* The decision here was affirmed by the Court of Appeals, March 26th, 1878.

§ See sec. 1309 of the new Code of Civil Procedure.

Rae v. Harteau.

APPEAL by the defendants from a judgment of this court entered upon verdict for the plaintiff.

This was an action brought against the principal and sureties upon an undertaking given in an action in the City Court of Brooklyn upon an appeal to the general term of that court from a judgment entered upon a verdict. The sureties alone answered.

The facts are stated in the opinion.

Lewis Beach, for appellant Harteau.

B. F. Lee, for appellant Wm. N. Beach.

Edwin T. Rice, for respondent.

ROBINSON, J.—A judgment was recovered by plaintiff, in the City Court of Brooklyn, against Lewis Beach; on the 2d day of October, 1872, for \$527 96, which, on an appeal to the general term of that court, was affirmed by judgment finally entered May 15, 1875, with \$131 66 costs of affirmation.

These defendants became sureties in an undertaking given for the purposes of that appeal. The decision on such appeal appears by an order to that effect, dated April 28, 1875, incorporated in the judgment roll and signed with the initials "G. G. R.," presumably those of Judge Reynolds, of that court, and also by the initials "G. W. K.," presumably those of George W. Knaebel, its clerk, but the costs were not taxed nor was the judgment perfected until May 15th, 1875. The undertaking contained the provisions required by sections 354, 355 and 356 of the Code, relating to appeals to a County Court from justices of the peace, or to this court from judgments of District Courts, instead of such as were required on appeals from such a judgment to the general term of the City Court of Brooklyn, by sec. 6, of chapter 470, of the Laws of 1870, assimilating such an appeal in all respects to that provided for in sections 348, 349 and 350 (chap. 4, tit. 11) of the Code, wherein provision is made for a stay of proceedings upon the order or judg-

ment appealed from, in the manner provided for by sections 334 and 335. The complaint alleges the entry of an order of affirmance of the judgment appealed from, on the 28th day of April, 1875, and the service of a *copy thereof*, on the 29th; also the issuing and return of executions upon the original judgment and that rendered on the appeal for costs wholly unsatisfied. The answer of the defendants, so far as material to the question now passed upon, admitted the filing in the office of the clerk of the City Court of Brooklyn, by plaintiff's attorney of certain papers claimed to be a judgment in the original action, on October 2, 1872, for \$527 96, and also papers claimed to be a judgment against the appellant, Lewis Beach, for costs of said appeal, for the sum of \$131 66, on the 15th day of May, 1875, but denied all other allegations in respect to said judgments. The present action was commenced in July, 1876. The question that first presents itself on this appeal is as to the right of the plaintiff to maintain the action for want of service of any written notice of the entry of judgment of affirmance that was perfected on the 15th of May, 1875. In my opinion the objection to any recovery is on this ground fatal to plaintiff's claim.

On the trial, the only notice which the plaintiff proved to have been served on his behalf, was a paper purporting to be a copy of the order signed by Judge Reynolds and the clerk, with their initials, before mentioned, but without any copy of said initials or any indication that any such order had been previously signed or any notice of its ever having been entered with the clerk of the court. The requirement of the entry of an order made upon *any decision* of a judge or court before any effect can be given to it is, under our system, a matter of substantial significance, and where granted by a judge in any judicial district, must be entered with the clerk of the county in which the trial is to be had or the judgment roll to be filed. And in this respect the final entry of an order upon the decision of a judge or court, however otherwise formal, becomes a matter of materiality. It was to such an "entry" of an order of affirm-

Rae v. Harteau.

ance that the 348th section of the Code has reference. Although, in such a local court as that of the City Court of Brooklyn, much of the reason for the distinction in reference to the decisions of the judges and the entry of orders thereon may not exist, the intention of the statute is yet clearly expressed, and must have such construction as entitles it to a *general* application to all the courts of this State, to which a common mode of entry of orders of affirmance is prescribed, with a view to the various purposes in respect to which such a *perfected order* becomes in any respect material. If the present case depended alone upon the force and effect of the decision, and its entry as an order, a presumption might possibly be indulged that the clerk entered the order immediately after the decision was made.

The notices required by the Code are always such as must be given in writing (sec. 408), and must be so explicit as plainly to give the information required by the statute. The paper served in this case of what was or was to be in terms an order of the general term, was without any indication of signature of judge or clerk, and with a mere indorsement of the title of the cause, followed by these words: "Copy order affirming judgment. To Diefendorf & Beach, attorneys for appellant; Brainard and Rice, attorneys for respondent." It conveyed no proper intimation that any such order had been entered with the clerk of the court.

But notwithstanding such a written decision of the general term may have been entered with the clerk, it did not become a *judgment of affirmance*, and no such judgment had been perfected so as to become the subject of further appeal, as contemplated by the provisions of the Code above referred to, at the time of serving such papers styled "copy order."

The amendment to section 348 of the Code by the act of 1862, while providing that no action should be commenced upon any undertaking given in pursuance of the provisions of *that* section, until ten days after the service of notice of the entry of the order or judgment affirming the judgment appealed from, had in contemplation, in addition to

mere judgments appealed from, such orders so affirmed at the general term in respect to which further appeals might be taken to the Court of Appeals, and also all such orders, or affirmance of orders, appealed from, in respect to which security had been given on the appeal to effect a stay of proceedings thereon, pursuant to the provisions of sections 334 to 339 of the Code. (*Staring v. Jones*, 13 How. Pr. 423; *Smith v. Heermance*, 18 id. 261; *Niles v. Battleshall*, 26 id. 93.)

The 349th section, giving such right of an appeal from orders, provides they may be taken "in like manner and with like effect," as from judgments, as allowed by section 348. The manifest intention of the amendment of 1862 above referred to, passed after the other provisions of sections 348 and 349 had gone into effect, and allowing appeals in common from judgments and orders, "in like manner and with like effect," must be taken distributively as requiring the notice of ten days to be given before suit brought on the undertaking in case of the affirmance of an order as well as upon the affirmance of a judgment. The object of the notice in either case, is to enable the principal debtor to protect his sureties, either by a further appeal to the Court of Appeals, or to provide for payment, before suit brought upon the undertaking, or to afford time to take some measures for their relief.

The decision upon the appeal taken by Beach, the principal, could in no way be effectually decided or disposed of by an "order," but only by a *judgment* of affirmance, duly perfected.

An order is but a decision upon a motion, and is expressly distinguished from a judgment (Code, sec. 400), which is defined (Code, sec. 245) as the final determination of the rights of the parties. A judgment is to be entered in the judgment book and perfected by the filing of a judgment roll (sections 280 and 281), from which the right of appeal from a judgment would begin to run (sec. 331). No notice of the judgment so perfected on May 15th, 1875, on the appeal in question, was ever served. The requirements of the statute (Code, sec. 348) are on this subject in terms

Rae v. Harteau.

equally positive with those of sec. 332, in which like terms are used and have been judicially passed upon. (*Staring v. Jones, supra* ; *Walton v. Nat. Loan Ass.* 19 How. Pr. 515.) The considerations calling for a strict construction of the statute as to the necessity of the service of the ten days' notice of the judgment (as perfected) above suggested are equally imperative, and its necessity to entitle the plaintiff to maintain an action against the sureties has been expressly recognized in the general term of the Supreme Court (3d district) in *Porter v. Kingsbury* (5 Hun, 597), not only holding the notice necessary but that service must be averred in the complaint. In this view of the rights of the parties it becomes unnecessary to consider the legal force of the undertaking given under the forms prescribed by sections 354, 355 and 356 of the Code, without exception taken to it as varying from the particular instrument required under sections 348, 334 and 335, or any other of the extremely technical objections occurring during the trial. Being of the opinion that the suit was, in any view taken of these latter objections, prematurely brought, the judgment should be reversed, and a new trial should be ordered, with costs to abide the result.

LARREMORE and JOSEPH F. DALY, JJ., concurred.

Judgment reversed, and new trial ordered, with costs to abide event.

After the foregoing decision, there was a new trial, on which the plaintiff attempted to show in the various ways, stated in the following opinion, a waiver of the notice. The defendants had judgment and the plaintiff appealed to the general term, where the following opinion was delivered on January 7th, 1878.

The appeal was argued by

Edwin T. Rice, for appellant.

Rae v. Harteau.

Lewis Beach, for respondent Harteau.

B. F. Lee, for respondent Wm. N. Beach.

JOSEPH F. DALY, J.—Certain of the facts of this case are recited in the opinions rendered at general term, March 5th, 1877, in this cause. The law of the case upon those facts must be considered as settled, so far as this court is concerned, by the former decision. That disposes of all questions as to the sufficiency of the notice given by the service of a copy of the order of April 28th, 1875, as a compliance with section 348 of the Code, requiring, as a condition precedent to the commencement of an action against sureties on an undertaking on appeal, the service on the adverse party of notice of entry of the order, or judgment affirming the judgment appealed from (Code of Procedure, sec. 348; *Porter v. Kingsbury*, 71 N. Y. 588). The question as to the language of the Code requiring service of the “order” or judgment appealed from was also disposed of by the general term decision, and cannot be now discussed.

Upon the new trial, at special term, plaintiff relied upon a waiver of the notice required by section 348. Also, upon the fact that the sureties, when demand was made of them, did not base their refusal to pay upon the want of service of notice. As proof under the first of these points, plaintiff had no direct waiver of notice to show, but offered proof that, after entry of judgment of affirmance, the defendant, on that judgment, without waiting to receive notice of such entry, moved the court in which the judgment was entered for a certificate authorizing him to appeal therefrom to the Court of Appeals (L. 1871, c. 282, § 8). This proof was excluded by the court, and properly. The notice required by section 348 is a step toward enforcing the liability of sureties, not toward limiting or extending the time or right to appeal, and proceedings looking to an appeal by the adverse party, without waiting to receive such notice, cannot be held, with any shadow of reason, to intend or to amount to a waiver of a notice designed for a totally different object. The last point made on

Rae v. Harteau.

this appeal is that the sureties are cut off from the defense of want of notice, under section 348, because they did not allege it when demand was made of them before suit, so that plaintiff might have supplied the omission. I know of no such rule of law in cases of money demand upon written obligations. In cases of tender and the like, objections not taken at the time of tender to its form or sufficiency cannot be urged afterwards. The decisions cited by appellant are of this character. (*Taylor v. Spader*, 48 N. Y. 664; *Stokes v. Recknagel*, 6 Jones & Sp. 368; *Gould v. Banks*, 8 Wend. 562; *Carman v. Pultz*, 21 N. Y. 547). But even if the rule were applicable generally, to cases of demand upon sureties, they could be required to make such objections as were within their knowledge and no other. The notice required by section 348 is not to be served on the sureties but on the successful party in the action, and they are not bound to know if it were served or not. Their privilege is to wait until plaintiff alleges and proves the notice, which he is bound affirmatively to do (*Porter v. Kingsbury*, *supra*). As to the point taken that the sureties here are indemnified, it can only be answered that they are sued as sureties, and the question as to necessary proof in such an action is settled by the decision last cited.

The judgment should be affirmed, with costs.

CHARLES P. DALY, Ch. J. and VAN HOESEN, J., concurred.

Judgment affirmed. *

* This decision was affirmed by the Court of Appeals, February 4th, 1879.

Fuentes v. Mayorga.

FELIPE FUENTES, Appellant, *against* JOSEPH M. MAYORGA
et al. (Impleaded) Respondent.

(Decided April 2d, 1877.)

An application to vacate an order of arrest, under § 204 of the Code of Civil Procedure (old), providing that a defendant may so apply at "any time before judgment," may be made after the rendition of a verdict in the action, and before the entry of the judgment thereon.

The plaintiff consigned goods for sale to one H., and he turned them over to a firm of which he was a member, at the same time disclosing the plaintiff's ownership, and the goods were sold by the firm. *Held*, that the transaction established no relation of personal trust or confidence between the plaintiff and the partners of H., and that in an action for a failure to pay over the proceeds of the sale, they were not liable to arrest under § 179, subd. 2, of the Code of Civil Procedure (old), as having received money in a fiduciary capacity.

APPEAL by the plaintiff from an order made by Judge VAN HOESEN, granting the defendants leave to renew a motion to vacate an order of arrest in the action, and also from an order thereafter made by the same judge vacating the order of arrest.

The action was to recover the proceeds of the sale of goods belonging to the plaintiff, and which had been sold for his account by the defendants, who were commission merchants in New York city. The motion to vacate the order of arrest was made after a verdict in the action for the plaintiff, but before the entry of judgment.

The affidavits on which the order of arrest was vacated showed (as Judge VAN HOESEN decided) that the goods had been consigned for sale by the plaintiff to one Huertemendia (who was also impleaded with these defendants in the action), and that he had turned it over to his firm,

Fuentes v. Mayorga.

composed of himself and the two Mayorgas, at the same time disclosing the name of the owner.

George Bell, for appellant.

E. T. Rice, for respondents.

JOSEPH F. DALY, J.—These appeals involve two questions: whether the motion to discharge the order of arrest was made within the time limited by section 204 of the Code, that is to say, before judgment; and, whether the defendants were liable to arrest upon the facts.

The motion to discharge the order of arrest, which was granted, was made after verdict and before the entry of judgment in the action. I think it was made in time. Section 204 of the Code provides that a defendant may apply "before judgment" to vacate the order. Without entering largely into a discussion of the meaning of this term, it may be sufficient to observe that a verdict is not a judgment, and that a verdict may be had and yet no judgment entered upon it, and that a judgment is that "final determination" (sec. 245) from which an appeal may be taken, and which is evidenced by the formal entry by the clerk of the court. (*Rae v. Harteau*, N. Y. Com. Pleas, G. T. March, 1877—see *ante*, p. 95.)

The defendants were not liable to arrest; they were commission merchants and received these goods to sell on commission; but this was not the case of a trust and confidence reposed in their integrity and fidelity rather than in their credit or ability, by the owner of the goods, and there was consequently no abuse of confidence nor breach of trust on their part. Without this feature of the relation between the factor and the principal there is no right to arrest. (*Stoll v. King*, 8 How. 298; *McBurney v. Martin*, 6 Robt. 502; *Sultan v. DeCamp*, 4 Abb. Pr. N. S. 484.) Defendants did not receive the consignment from the plaintiff, but from their partner, Huertemendia, who was the only person in whom the trust or confidence of plaintiff was placed, and

Gottwald v. Tuttle.

who did not receive the consignment from plaintiff as a member of defendant's firm, but individually.

The verdict in plaintiff's favor was not conclusive against defendants, who might be liable to account for the proceeds of the goods and yet not liable to arrest, as persons acting in a "fiduciary" character.

The order should be affirmed, with \$10 costs only, as both appeals were argued together on one set of papers.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Ordered accordingly.

CHRISTIAN GOTTWALD, *et al.* Appellants, *against* CHARLES TUTTLE, Respondent.

(Decided April 2d, 1877.)

Under § 340 of the Code of Procedure (old Code), which provides that the undertaking to stay execution pending appeal may be in one instrument or several, where an undertaking by two sureties fails of approval because one of the sureties is insufficient, if, afterwards, a separate undertaking is executed by another surety alone, he is bound, although the former undertaking, by reason of having failed of approval, has become void.

APPEAL by the plaintiffs from an order of this court, made by Judge VAN BRUNT, at special term, sustaining a demurrer to the complaint.

The complaint alleged that in a suit in the Superior Court of the City of New York, in an action for the recovery of personal property against these plaintiffs by one Robert

Gottwald v. Tuttle.

Cochran, they recovered a judgment from which Cochran appealed to the general term of that court, and gave an undertaking to stay execution, on which Wellington Clapp and P. L. Berretta were sureties; that upon exception made to the sufficiency of the sureties, and examination of them, a justice of that court refused to approve the undertaking, and stated that he did not consider Berretta sufficient, and ordered the plaintiff (Cochran) to find some one else instead of him; that thereafter the defendant executed an undertaking to stay execution pending the appeal; that upon the appeal the judgment was affirmed, and that the plaintiff in that suit had not satisfied the judgment. A copy of the undertaking executed by the defendant here was annexed to the complaint, and was in the usual form executed by the defendant Tuttle alone.

Spencer L. Hillier, for appellant.

Charles Meyer, for respondent.

CHARLES P. DALY, Chief Justice.—I think the demurrer was not well taken, and that the decision at the special term, sustaining it, was erroneous. The complaint avers that the justice refused to approve the undertaking because he did not consider Berretta, one of the sureties, competent, and that he ordered the plaintiff to find some one else instead of Berretta. That another surety may be substituted for the one who fails to justify is contemplated by sec. 341 of the Code. Before the Code, if one of the bail failed to justify and was rejected, the bail-piece was regarded as a nullity, and a new bail-piece was required, and a new notice of justification. (*Lewis v. Gadderr*, 5 Barn. & Ald. 704.)

The bail, when excepted to, were considered as no bail, unless they justified. If they did not, the court would order their names to be stricken out of the bail-piece, although, until this was done, they might be proceeded against. (1 Tidd Pr. 258, 9th Lond. Ed.)

Our Court of Errors, however, held in the unreported

Gottwald v. Tuttle.

case of *Drummond v. Watson* (see 4 Comst. 171), that the sureties in an error bond, after exception and failure to justify, were discharged without any further proceeding.

But the Code has made an important change. It provides that the undertaking prescribed by sec. 335 may be in one instrument or several, at the option of the appellant, which avoids the difficulty in the former practice, where there could be but one bail-piece.

The defendant's undertaking by a separate instrument was good, and whether Clapp, the other surety, was answerable or not, the defendant was estopped (*Decker v. Judson*, 16 N. Y. 446, 447, 449; *Hill v. Burke*, 61 id. 115, 116, 117; *Shaw v. Tobias*, 3 id. 191, 192) by the instrument which he signed, the appellants having had the benefit of the consideration for the defendant's undertaking, namely:—a stay of the proceedings until the decision and judgment of the general term of the Superior Court was given; which is to be assumed from the averment in the complaint, that the judgment appealed from was affirmed, and that the appellant has not paid any part of it, or delivered up the property to the plaintiff, the judgment appealed from being that the plaintiffs here, who were the defendants, were entitled to the possession of the property. The undertaking which the defendant signed has accomplished all that it was intended to effect, and it does not lie with him to object that the prior undertaking was discharged as respects Clapp, because the court refused to approve it, not considering Berretta sufficient.

The defendant made no stipulation that any other person was to become cosurety. The name of no other person appears in the instrument, and no such understanding can be implied. He agreed that if the judgment was affirmed, or the appeal dismissed, he would pay the amount of the judgment. The consideration for his undertaking has been received, and so far as respects his liability, it is immaterial whether Clapp is liable as surety or not.

JOSEPH F. DALY and VAN HOESEN, JJ., concurred.

Order sustaining demurrer reversed.

The Howe Sewing Machine Co. v. Haupt.

THE HOWE SEWING MACHINE COMPANY, Respondent,
against FREDERICK HAUPT, Appellant.

(Decided April 2d, 1877.)

A complaint in a justice's court which simply shows that the action is "for the recovery of personal property valued at eighty-five dollars" does not allege such a wrongful taking or detention of property as will sustain an action of replevin, and does not show any cause of action at all; and when in the justice's court this defect is pointed out, and the plaintiff having been given leave to amend, does not cure the defect, and against the objections of the defendant the justice allows the plaintiff to introduce evidence under such a complaint, instead of dismissing it, this court on appeal will not conform the pleadings to the proof, but will reverse the judgment. In such a case, this court on appeal is bound to reverse the judgment.

Where the plaintiff had sold a sewing machine to the defendant's wife, to be paid for by certain instalments, and to be returned to the plaintiff in case such payments were not made, in an action against the defendant for the wrongful detention of the machine after a failure to pay certain of the instalments, proof of non-payment and of a formal demand for the machine on the defendant's wife (who did not refuse to deliver it), and that thereafter, in a conversation between the plaintiff's agent, who had made the demand on the defendant's wife and the defendant, about paying what was due on the machine, the defendant had said that he would not pay him, but would go to the office and pay;—*Held*, no evidence of a wrongful detention or wrongful conversion of the machine by the defendant.

APPEAL by the defendant from the judgment of a justice's court in the City of New York.

The facts necessary to an understanding of the questions decided on the appeal are sufficiently stated in the opinion.

CHARLES P. DALY, Chief Justice.—This judgment cannot be sustained. The complaint is simply "for the recovery of *personal property*, valued at eighty-five dollars." It does not set forth upon what ground the plaintiff is entitled to recover the personal property claimed, the nature, kind or description of which is not even indicated. It should aver either a wrongful taking or a wrongful detention of the property on the part of the defendant, to create a cause of

action against him; and it does neither. The affidavit is in an action for claim and delivery. It avers that the plaintiffs are the owners of a sewing machine which the defendant *wrongfully detained* from them, and we might conform the pleadings to the proof, if the defendant had not called the attention of the court below to the defective character of the complaint, and objected to the giving of any evidence under it, and moved the court to dismiss it on the ground that it disclosed no cause of action, which the court denied.

The complaint might have been amended so as to conform it to the cause of action set forth in the affidavit; but, although the justice allowed the plaintiffs to amend, and they availed themselves of the privilege, their amendments resulted in leaving the complaint substantially as it was. The plaintiffs' counsel seems to have been unable to see the defect in the complaint, telling the court that he understood it as a complaint for the recovery of personal property valued at eighty-five dollars; and that that was the complaint upon which he meant to go to trial. When a party's attention is called to the fact that his complaint discloses no cause of action, and he yet persists in going to trial upon it, and the judge, against the defendant's remonstrance and objection, sustains him, there is no course left for an appellate court but to reverse the judgment.

In furtherance of justice, we are disposed to go very far, in sustaining a judgment in a justice's court where the pleadings are imperfect, but the evidence is sufficient to substantiate it. But there is not enough in this case to enable us to do so. The pleadings not only lack the averment of a demand; but there is no proof in the case of the requisite demand, to entitle the plaintiff to sustain an action for claim and delivery. It appears, upon his own showing, that the sewing machine came into the possession of the defendant's wife, under a contract between her and the plaintiffs for the purchase of it; she signing the name of Peter Röder, under which contract she had paid \$50. The plaintiffs claimed the right, under the contract, to repossess themselves of it, through her failure to pay the residue of the purchase money

The Howe Sewing Machine Co. v. Haupt.

in the monthly instalments as agreed upon; and to entitle them to maintain an action against the defendant, it was necessary to show that he was in possession of the machine; that a forfeiture had been incurred by failing to pay the instalments, and that, upon a formal demand made upon him for the delivery of the machine, the defendant had refused to give it up. A demand was shown upon his wife. She did not refuse, but the demand being made at an early hour in the morning—between seven and eight o'clock—she said her husband was asleep, and she would wake him up, which it appears she did, and all that took place with him was some conversation about paying what was due upon it;—he, upon the plaintiffs' own showing, saying that he would not pay the person who called upon him, but would go to the office and pay;—he, on his part, testifying that what he wanted was to consult his lawyer, to satisfy himself that what they claimed was right. Upon his cross-examination by the plaintiffs' counsel, he said a demand was made upon him at half-past seven o'clock in the morning; but it is evident that what he referred to was the demand mentioned in the first part of his cross-examination; which was, that when plaintiffs' agent called in the morning, he demanded \$35. In his direct examination, the defendant positively swore that no person demanded the machine until the marshal came to take it officially, with the authority of the replevin papers. There was no evidence therefore, in the case, either of a wrongful detention or a wrongful conversion to sustain the action.

JOSEPH F. DALY and VAN HOESEN, JJ., concurred.

Judgment reversed.

Huebner v. Roosevelt.

CHARLES HUEBNER, Respondent, *against* CLINTON ROOSEVELT, Appellant.

(Decided April 2d, 1877.)

A witness cannot be impeached by showing that certain circumstances to which he has testified on the present trial were omitted by him when testifying concerning the same occurrence on a former trial of the action, unless at the former trial the attention of the witness was particularly called to the circumstances which he then omitted to state.

Where on the trial the defendant had been the only witness as to the terms of a verbal agreement that the defendant alleged had been made between himself and the plaintiff, and the jury having found against him on the issue as to whether such an agreement had ever been made ; on a motion for a new trial, on the ground of newly-discovered evidence, the defendant produced the affidavit of a person who swore to having heard such an agreement discussed between the plaintiff and defendant, and the plaintiff express a willingness to make it, and the defendant also swore that he had forgotten that the witness was present at any such conversation (which was eleven years before the trial), and that he was only reminded of it by the witness informing him of it after the trial. *Held*,

1. That although the defendant had testified generally to the making of the agreement, yet, as no testimony had been offered as to this particular interview, the testimony was not cumulative.
2. That the defendant's excuse for not having produced the witness on the trial was reasonable, and that the evidence was of such a nature and weight under the circumstances as warranted the granting of a new trial.

APPEAL by the defendant from a judgment of this court entered on the verdict of a jury after a trial before Chief Justice CHARLES P. DALY, and also from an order made at special term by Judge ROBINSON, denying a motion for a new trial on the ground of newly-discovered evidence.

The action was to recover from the defendant \$300 as a year's rent for a portion of the fourth floor of No. 23 Chambers street, in the city of New York, being from May 1st, 1866, to May 1st, 1867.

The defendant admitted having occupied the premises for the period named, but alleged in his answer, and as a witness on his own behalf, on the trial, swore that at the time he

Huebner v. Roosevelt.

entered into possession of them, on May 1st, 1866, the plaintiff was indebted to him in the sum of \$1,000 and upwards for the rent of the fifth floor of the same No. 23 Chambers street, which the plaintiff had, during the years from 1857 to 1866, rented from the defendant, who then had a lease of it from the owner; and that in 1866, when the plaintiff became the lessee from the owner of the whole building, it was agreed that the defendant should occupy the rooms on the fourth floor, for which the plaintiff claimed rent in this action, and that the reasonable value of such use and occupation should be credited on what was due from the plaintiff to the defendant.

The jury found a verdict for the plaintiff. The defendant was the only witness produced on the trial who swore to the agreement alleged in his answer, but, after verdict on the motion for a new trial on the ground of newly-discovered evidence, he produced the affidavit of one Horatio D. Sheppard, a physician, which was as follows :

“ That he has known Clinton Roosevelt, Esq., since the year 1832. That, in the latter part of the year 1865, deponent was in defendant's office, at 23 Chambers street, New York City. Charles Huebner, plaintiff, came into defendant's office. Plaintiff asked deponent how he got on in his business; plaintiff replied, “Not very well.” Defendant then asked plaintiff how he got on with the *other* business. Deponent learned from the conversation that it was some business deponent had given him. Plaintiff said he done *something*, but it did not now amount to much. Plaintiff appeared to be in trouble for the want of sufficient employment to give him a living. Defendant then said, I think I can put you in a way to get along. You take the lease of this house. I will recommend you to the landlord; you collect the rents which I neglect or fail to do, because I am too easy. The tenants plead hard times, and say they cannot pay. If you collect faithfully you will have a clear profit, and have the attic floor where you live and my office free. Let the future rents of my office go to pay your indebtedness to me. When that indebtedness is paid, you

Huebner v. Roosevelt.

will then have a place to live in and a clear income from the profit of this building. This, with the pay your wife will get for cleaning, caring for and lighting the fires in the offices; you will get along well. Plaintiff expressed himself as well pleased with defendant's propositions, and expressed much gratitude therefor, and said he would enter upon their execution as soon as they could be brought about."

The defendant also made affidavit that on account of the time that had elapsed since the agreement between himself and the plaintiff (the action was commenced in 1871, but the trial on which this verdict was rendered was on December 7th, 1876) he had entirely forgotten that Sheppard was present at any such conversation, "until by some accident said Sheppard learned, soon after said case had been decided, the result, and then called upon the deponent and inquired whether the facts set forth in his said affidavit were material to the issue, and being informed they were, made said deposition which was subscribed and sworn to by him."

Dan Marvin, for appellant.

Max C. Huebner, for respondent.

VAN HOESEN, J.—The plaintiff was examined as a witness on his own behalf, and when cross-examined by defendant's counsel, was asked with respect to a material statement, "Did you ever tell that before on any trial of this cause; if so, when and where?" The court sustained an objection to the question, and the defendant excepted. The defendant argues that the presumption is that the question would have been answered in the negative, and would have convicted the plaintiff of inventing a falsehood to make out his case, and thus have made his whole evidence unworthy of credit. A witness cannot be impeached by showing that on a former trial, when testifying on the subject under investigation, he omitted to state circumstances which he details on the pending inquiry. It is no contradiction, unless the attention of the witness was, at the former trial, called particularly to the

VOL. VII.—8

Huebner v. Roosevelt.

matters which he then omitted to state. (*Commonwealth v. Hawkins*, 3 Gray, 463.) The defendant's exception to the refusal of the court to allow him to show how much he paid Mrs. Huebner for her services as janitress for the year 1866-1867 is not well taken. The question was not material to any issue raised by the pleadings. The only remaining exception is untenable, because it was purely a matter of discretion with the judge at the trial to admit on the rebuttal evidence, which ought properly to have been offered by the plaintiff before he first rested his case.

We have noticed the exceptions, because we are satisfied that upon the trial there was no error committed by the learned chief justice who presided. We think, however, that a new trial ought to have been granted upon the motion made upon the ground of newly-discovered evidence. The affidavit of Dr. Sheppard shows that he was present at a conversation in the latter part of the year 1865, at which an agreement was made between the plaintiff and the defendant that the rent of the office occupied by the latter was to be offset by the indebtedness of the plaintiff to him, under the new arrangement then agreed to. Although the defendant had testified generally to such an agreement, no testimony was offered on the trial relating to this particular interview at which Dr. Sheppard was present, and under the case cited below the testimony was not cumulative. (*Simmons v. Fay*, 1 E. D. Smith, 114; *Wehrkamp v. Willett*, 1 Daly, 4; *Oakley v. Sears*, 1 Abb. Pr. N. S. 368.) The defendant's excuse for not producing Dr. Sheppard as a witness was reasonable; eleven years having elapsed between the interview mentioned in Sheppard's affidavit and the time of the trial of this action. The order and judgment should be reversed, and a new trial granted, with costs to abide event.

JOSEPH F. DALY and LARREMORE, JJ., concurred.

Judgment reversed and new trial ordered.

Young v. Weeks.

WILLIAM J. YOUNG *et al.* Appellants, *against* EDWARD
WEEKS, Respondent.

(Decided April 2d, 1877.)

In an action in the Supreme Court, the defendant had been arrested, and subsequently the order of arrest had been vacated on the ground that the complaint united two causes of action, on one only of which the facts authorized the defendant's arrest. The plaintiffs discontinued the suit in the Supreme Court, and sued in this court, alleging, substantially, the same facts, but framing them so as to make a single cause of action, and procured an order of arrest against the defendant. *Held*, that this second order of arrest was vexatious and should be vacated.

The defendant was arrested on affidavits showing that by fraudulent representations as to his affairs the defendant had induced the plaintiffs under an agreement theretofore made, by which the plaintiffs agreed to fill the orders of the defendant "to such parties as they may regard safe and responsible, and in such amounts as they shall deem proper,"—to sell and deliver to the defendant, and to his customers, at his request, goods to a certain amount, a part of which had not been paid for. *Held*, that there being nothing to show what portion of these goods had been sold to the defendant, and what portion to his customers, the order of arrest could not be maintained, and that the fact that the defendant had admitted that all the goods were sold to him upon his own credit, could not change this result, since the plaintiffs must recover, if at all, on the facts alleged by them as their cause of action.

APPEAL by the plaintiffs from an order of this court made at special term by Judge VAN HOESEN, vacating an order of arrest.

The affidavits upon which the order of arrest was obtained charged that the defendant had obtained goods upon credit from the plaintiff by a fraudulent statement of his affairs. Annexed to the affidavits was a copy of the agreement under which the goods had been delivered, the material parts of which were as follows :—

"Whereas the said defendant proposes to engage in the purchase and sale of butter and other produce, at No. 179 Reade street, in the city of New York; and whereas, said plaintiffs propose to fill the orders of said defendant for such butter

Young v. Weeks.

and produce to customers from time to time; now, it is understood and agreed, that the said plaintiffs are to fill the orders of said defendant to such parties as they may regard safe and responsible, and in such amounts as they shall deem proper.

“And it is expressly agreed that the books and accounts of said defendant, pertaining to said business, are to be at all times open to the inspection of said plaintiffs, and are to be fully posted up at least once in each week, so as to show the true state and condition of said business; and the accounts pertaining to said business are to be subject to the direction and under the control of said plaintiffs.

“It is further agreed that said defendant shall faithfully and promptly account for and pay over to the said plaintiffs all the proceeds of the sales by him made of such butter and produce, after first deducting therefrom, for his service, care, and attention, in and about said business, the profits made by him upon such sales.

“And it is further and finally expressly agreed and understood, that the said defendant shall not, without the consent of said plaintiffs, engage in the purchase and sale of commodities not furnished by them; and that he will well and faithfully keep the said plaintiffs informed and advised of all and every his acts in the premises.”

The affidavit alleged that, relying upon the defendant's statements and representations, the plaintiffs had sold and delivered to the defendant and to his customers, at his request, goods on which there remained a balance of \$2,007 88.

On the motion to vacate the order of arrest it appeared that an action had previously been commenced in the Supreme Court to recover this same sum of \$2,007 88, and that in that action \$971 30 of this sum had been charged in the complaint as money paid for the defendant's benefit, and at his request, and the balance for goods sold and delivered to him, and that in the action in the Supreme Court an order of arrest had been granted on the same grounds as the one here, and subsequently vacated. On the motion to vacate the order of arrest in this court, there was introduced an affidavit by one of the plaintiffs' attorneys (who had also been the attorneys for

Young v. Weeks.

the plaintiffs in the suit in the Supreme Court), stating that the order of arrest there had been vacated solely on the ground that the complaint in that action included a cause of action in addition to that on which his arrest was sought, and that the justice who vacated the order stated on doing so that in his opinion the defendant could be rearrested.

Judge VAN HOESEN, on vacating the order of arrest here, wrote the following opinion:—

“The order of arrest ought to be vacated. The plaintiffs’ papers show that an agreement was made between the parties to this action by which the plaintiffs were to fill the orders for butter and produce of such customers as the defendant might, from time to time, introduce, provided the plaintiffs regarded such customers as safe and responsible for such amounts as they (the plaintiffs) deemed proper to deliver. The books and accounts of the defendant were, by the terms of the agreement, to be subject to the direction and under the control of the plaintiffs.

The affidavits on which the order of arrest was obtained allege that the defendant, on the 10th of January, 1876, rendered to the plaintiffs an account in writing which falsely stated his book accounts to be larger in amount than they actually were. Then follows the allegation that, relying on said statements, etc., the plaintiffs sold and delivered to the defendant, *and to his customers*, at his request, goods to the amount of \$12,238 51, of which amount there remains due to the plaintiffs the sum of \$2,007 88.

From these allegations it is impossible to determine how much of the plaintiffs’ loss resulted from the failure of those customers whom they “regarded as safe and responsible,” and how much from the defendant’s neglect or refusal to pay his bills. It may be that the defendant himself has paid for all the goods which came into his hands, and that he is to-day a prisoner merely because the plaintiffs were mistaken as to the solvency of the customers whom they considered safe and responsible. There is no necessary connection between the defendant’s alleged false representations and the loss which the plaintiffs complain of. But, to warrant an arrest,

Young v. Weeks.

the damage should result from the fraud. From the purport of the agreement annexed to Wm. I. Young's affidavit, as well as from the affidavit itself, I have great doubts whether the plaintiffs permitted any goods whatever to pass into the hands of the defendant. Although the affidavit is not consistent in all its parts, I think it not unfair to construe it to mean that the goods were all delivered to customers introduced by the defendant, but that the plaintiffs think that, as matter of law, they are at liberty to maintain that the goods were sold to the defendant himself.

If the defendant falsely represented the customers he introduced to be solvent, an action for deceit might lie against him. If he obtained goods from the plaintiffs by means of false representations as to his own resources, he might be arrested in an action for goods sold and delivered. But no matter how false his representations respecting his assets were, he is not liable to arrest in an action for goods sold and delivered, where it appears, as it does in this case, that he was a mere toiler, and that the plaintiffs selected their vendees from among the customers he introduced, and then, acting solely on their own judgment, delivered to them no more goods than "they deemed proper." The plaintiffs evidently depended on the responsibility of those to whom the goods were delivered, and not upon the defendant, or upon his opinion as to the solvency of customers. In face of the agreement, and of Young's affidavit, I think it wrong to assume, as I must do, in order to uphold this arrest, that the defendant was the actual buyer of the goods, and that he ordered them to be delivered on his individual responsibility to customers of the plaintiffs' selection. Of course, this arrest can not be supported on the ground that the defendant has collected and wrongfully withheld moneys belonging to the plaintiffs.

I have examined the affidavit on which a justice of the Supreme Court granted an order of arrest against this defendant, in a suit brought against him by the plaintiffs, for the same cause of action. Apart from the objection which caused the discharge of that order, I think that affidavit fatally

defective. For the second time the defendant has been arrested on insufficient grounds. The fact appears to be that the plaintiffs have no reason recognized as valid by the laws of this State for the arrest of the defendant. The affidavit in this case was drawn with care, and the attorney who prepared it exhausted his ingenuity in making his statement specious, but nevertheless he has failed, doubtless from want of material, to bring his case within sec. 179. I think the second arrest vexatious. The order of arrest must be vacated, with \$10 costs to the defendant."

William H. Arnoux, for appellants.

W. H. & D. M. Van Cott, for respondent.

JOSEPH F. DALY, J.—The judge at special term was justified in vacating the order of arrest. It was a second arrest of defendant for the same cause of action as the first arrest, upon papers presenting substantially the same defect as the papers in the first suit in the Supreme Court. Plaintiffs were bound to show that the second arrest was not vexatious, and if they fail to do so the court will infer it. (*Archer v. Champneys*, 3 Moore, 307, cited in *People v. Tweed*, 5 Hun, 382.) It may be that an honest mistake of a plaintiff in selecting his forum or his remedy in the first instance will not prejudice his right to a second order of arrest; the case of *People v. Tweed*, above cited, furnishes an illustration of how far the courts will go in so holding; but the circumstances of each particular case must determine to what extent the mistakes of the plaintiff may be allowed to bear on defendant to the extent of needlessly harassing him, and how many experiments may be unsuccessfully resorted to to seize a debtor's body before the court will protect him. Here the plaintiffs sued in the Supreme Court, and united in their action two causes of action, upon one only of which they could arrest defendant. The order of arrest was vacated. Plaintiffs sue now in this court and frame a statement of a cause of action covering the same demand, substantially,

Young v. Weeks.

which they made in the Supreme Court, but ingeniously worded to assume the shape of a single claim. The judge at special term concluded this arrest to be vexatious, and I can hardly disagree with him.

But a graver difficulty is pointed out by him in his opinion rendered on the motion to vacate the order. It does not appear beyond a reasonable doubt on plaintiffs' papers—in fact it is by no means clear—what plaintiffs' demand is upon which they claim to arrest defendant. They sue upon a special agreement, under seal, by which plaintiffs were to sell goods, taking orders from third parties to whom plaintiffs, if satisfied of their responsibility, were to furnish goods, defendant to collect and account for proceeds of sales. They set up that they sold and delivered goods "to defendant and to his customers" to the amount of \$12,238 51; that they sold and delivered "to defendant" goods to the amount thus stated, to wit, \$12,238 51, on which a balance is now due of \$2,007 88. But for the fact that plaintiffs set up as part of their cause of action and of arrest the agreement before mentioned, and averred that the goods to the amount mentioned were furnished "to defendant and his customers," it might be said that the mere allegation of the making of the agreement was surplusage and did not affect the only cause of action set up in the papers, a sale to defendant. But the agreement has some significance taken in connection with the sworn statement that the goods were furnished to defendant and his customers; a claim based upon that agreement is evidently contemplated though not developed in the affidavit, enough being stated to show, however, that part of plaintiffs' demand is for other goods than those sold to defendant. Under these circumstances the order of arrest was properly vacated, the ground of arrest being fraud in contracting the debt for goods sold to defendant on his sole responsibility.

Plaintiffs' claim, however, that an affidavit of defendant (read on the motion to discharge the arrest in the action in the Supreme Court, and introduced on this motion with the whole record of the Supreme Court proceeding) shows that

Schwarz v. Oppold.

all the goods claimed for were sold to defendant on his credit.

But this averment by defendant of an agreement or state of affairs differing from that set up by plaintiffs, and on which plaintiffs claim judgment, will not help them. If they cannot recover upon the agreement they set up they cannot recover in this action upon a different agreement set up by defendant as a defense. The averment in defendant's affidavit is inconsistent with any claim made by plaintiffs in the Supreme Court or in this court upon the agreement of November 9, 1874, upon which they rely.

The order should be affirmed.

CHARLES P. DALY, Ch. J.—I concur upon the ground that the arrest in this court was vexatious, the defendant having been arrested for the same cause in the action in the Supreme Court, and after a hearing discharged.

LARREMORE, J., concurred.

Order affirmed.

ANTON SCHWARZ *et al.* Appellants, *against* WILLIAM
OPPOLD *et al.* Respondents.

(Decided April 2d, 1877).

In an action upon a promissory note, the defendant, under a general denial, may prove as a defense a fraudulent alteration of the note made after its execution.

Quære, whether, upon principle, such a defense is not new matter which should be set up in the answer. Per CHARLES P. DALY, Chief Justice.

Judgment as for want of an answer cannot be given at trial, for the reason that the defendant there testifies that he did not verify his answer to the verified complaint. An objection at the trial that a pleading is unverified is too late.

Schwarz v. Oppold.

APPEAL from an order of the general term of the Marine Court of the city of New York, reversing an order granting a new trial, and from the judgment entered in pursuance of such order.

The facts are stated in the opinion.

Henry Wehle, for appellants.

Peter Cook and *Albert M. Shuck*, for respondents.

VAN HOESEN, J. This was an action upon a promissory note, of which the plaintiffs were *bona fide* holders, for value and before maturity. The answer of the defendant, William Oppold, was a general denial. Louisa Oppold, a codefendant, pleaded that she was a married woman, and that she indorsed the note under coercion, and that she did not waive notice of presentment and non-payment, though there is a waiver of such notice written upon the back of the note above her signature.

Upon the trial, the defendants were permitted, in spite of the plaintiffs' objection, to give evidence showing that the words "with interest" were without the sanction or knowledge of the defendants, written in the note by the payee, after the execution and delivery of the instrument. The plaintiffs' objection was that the fraudulent alteration of the note was a matter of defense arising subsequently to the execution of the instrument, and that it could not therefore be proved without having been pleaded. The court overruled the objection, and received the evidence. The case of *Boomer v. Koon* (6 Hun, 645) is an authority directly in point, and it decides that under a general denial the defense of fraudulent alteration may be proved. We are inclined to adopt the views expressed by the court in that case, though we perceive the force of the argument presented in the dissenting opinion of Mr. Justice Mullin.

When the defendant, Louisa Oppold, was on the stand as a witness, she was led to say, upon cross-examination, that she had not verified her answer in the case, though the jurat

Schwarz v. Oppold.

was in proper form, and it bore the official signature of a notary public. The plaintiff thereupon moved for judgment against her as for want of an answer. The court overruled the motion, and the plaintiff excepted. We think there was no error in the ruling. It is too late at the trial of a cause to raise the objection that a pleading is not verified. The object of requiring pleadings to be verified, is to prevent the interposition of untrue answers or replies, and to save suitors from the expense and trouble of preparing for the trial of issues raised by false or sham pleadings. When it is discovered, during the course of a trial, that an answer has not been verified, the better course is to allow the trial to proceed. Both parties are in court with their witnesses, ready to contest the issues. The answer may not be false, though it be not verified. A defendant may be utterly free from blame, notwithstanding a notary public may have certified, by an innocent mistake, or even with a fraudulent design, that the pleading has been verified. To adjudge summarily and without a full hearing of all the parties concerned, that a defendant and a notary have committed a fraud upon the court, and that the defendant has forfeited the right to interpose a defense, would be a rash proceeding, and it ought to be founded on proof more satisfactory than the statement of a defendant, that at the time the verification purports to have been made, she did nothing more than read and sign the answer, at the notary's request.

The jury found a verdict in favor of the defendants, and I have read the testimony, and I am of the opinion that the verdict was not against the weight of evidence. The preponderance of evidence was, in my judgment, decidedly in favor of the defendants; and I concur with the general term of the Marine Court as to the propriety of reversing the order for a new trial which was made at the special term.

The order and the judgment appealed from should be affirmed, with costs.

JOSEPH F. DALY, J., concurred.

Trunninger v. Busch.

CHARLES P. DALY, Chief Justice. I think it exceedingly doubtful whether this alteration in the note, after it was made and delivered by the defendant, was not new matter within the meaning and intent of the Code, which should have been specially set up as the defense, that the plaintiff might not be taken upon the trial by surprise. But as the point has been determined otherwise in a reported case, I think it is better that there may be uniformity in the practice to follow that decision, leaving it to the court of last resort to settle the question finally if the construction given to the Code in that decision is erroneous. I therefore concur in the conclusion of Judge Van Hoesen.

Order and judgment affirmed, with costs.

JOHN V. TRUNNINGER, Appellant, *against* PETER BUSCH,
Respondent.

(Decided April 2d, 1877.)

The right which exists to arrest a factor for not paying over the proceeds of goods sold by him on commission is barred by the principal's receiving from him the promissory notes of third parties, collecting some of them, and retaining the others, without any offer to return them.

The case of *Kelly v. Scripture* (9 Hun, 283), and other cases, where, after dishonor of notes given by a factor for the balance due the original cause of action, was held to be revived, distinguished by JOSEPH F. DALY, J.

APPEAL from an order made at special term by Judge VAN HOESEN, vacating an order of arrest.

The order of arrest was obtained upon an affidavit in an action brought to recover a balance due for goods sold on commission by the defendant as a factor. The motion to vacate was made upon the verified answer and upon an affidavit alleging that the defendant had indorsed and turned over to plaintiff, in payment of the full amount of the proceeds of the goods, several promissory notes of third parties;

Trunniger v. Busch.

that some of these notes plaintiff had collected, and that none of them had he returned or offered to return.

The following opinion was delivered at special term by Judge VAN HOESEN:—"The defendant was at one time undoubtedly liable to arrest in an action brought against him for the proceeds of goods which came into his hands as a factor (*Duguid v. Edwards*, 50 Barb. 286), a case repeatedly and recently approved. The difficulty encountered by the plaintiff, however, is that, instead of suing the defendant, as a factor, and obtaining an order of arrest, he accepted certain notes from him, some of which have been paid and cannot be surrendered to the defendant. It is not necessary to go to the length which Judge Harris went to in *Alliance Insurance Company v. Cleveland* (14 How. Pr. 408), and to decide that the mere acceptance of a note from an agent who has defaulted in his payments will at all times preclude an arrest of the defaulter. But it seems to be clear that taking and retaining such notes or the transfer or the collection of them will bar the right to arrest. Upon the defendants stipulating not to sue for malicious prosecution, the order of arrest will be vacated."

Wm. W. Goodrich, for appellant.

Augustus Ford, for respondent.

JOSEPH F. DALY, J.—The complaint is in the usual and proper form in an action or contract against a factor for failure to pay a balance due for goods sold by him on commission for plaintiff. (*Conaughty v. Nichols*, 42 N.Y. 83.)

There are no allegations in the complaint other than those proper in an action upon contract; but the affidavits on which the order of arrest was granted contain a statement that the plaintiff had received from defendant, "as security for the balance due, the notes of third parties." Certain allegations are contained in the affidavit as to representations and concealments by defendant when he gave the notes, but no fraud is alleged or shown on his part in the transfer of the securities. Defendant's affidavit is to the effect, among

Lynch v. McNally.

other things, that these notes of third parties were taken by plaintiff in payment, and two of them have been collected by plaintiff, and the proceeds retained, and the others have not been paid, and plaintiff has never offered to return them.

The judge at special term held that the taking of the notes of third parties, collecting some of them and retaining the others, barred the right to arrest. (*Alliance Ins. Co. v. Cleveland*, 14 How. Pr. 408.)

I think the decision correct. This case is to be distinguished from *Kelly v. Scripture* (9 Hun, 283); *Shipman v. Shafer* (14 Abb. Pr. 449); *Dubois v. Thompson* (1 Daly, 309), where upon the dishonor of the note or notes given by the factor for the balance due the right to sue upon the original indebtedness revives. Here some of the notes of the third parties were paid, and plaintiff, without offering to surrender the other unpaid notes of third parties, indorsed by defendant, brings this action on the original claim against him as factor, and seeks an order of arrest. The arrest is undoubtedly oppressive and unauthorized, and was properly vacated.

The order should be affirmed, with \$10 costs.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Order affirmed, with \$10 costs.

JULIA LYNCH, Respondent, *against* PATRICK McNALLY,
Appellant.

(Decided April 2d, 1877.)

An action for an injury inflicted by the bite of a vicious dog, which the owner, with a knowledge of its propensities, suffers to go at large, is not founded upon the ordinary liability for negligence; but upon the ground that to harbor such an animal and allow him to go freely about or in the public thoroughfare, shows such a disregard for the safety and lives of others as to partake of the character of a willful wrong, which, in itself, constitutes the cause of action for the injury inflicted by the animal.

Lynch v. McNally.

In such an action, therefore, no such defense can arise to defeat the action, as contributory or co-operative negligence. Negligence on the part of the plaintiff, however, may be shown, but it goes only in mitigation of damages.

The liability of the owner or harbinger of the dog rests upon his knowledge of the animal's dangerous propensities, and his allowing him to go at large where he may inflict injury.

The authorities in the case of injuries by ferocious animal reviewed.

Where the defendant on cross-examination elicited the same statement that the witness had made on the direct, and then moved to strike it out, which the court refused:—*Held*, that he was not injured; for if his motion had been granted, it would not have shut out the evidence, as it was in on the direct, and it was then too late to strike it out in the direct.

APPEAL by the defendant from a judgment entered in favor of the plaintiff upon a verdict rendered at a trial held before Judge VAN BRUNT and a jury.

The action was brought to recover damages for injuries to the person of plaintiff inflicted by the defendant's dog.

It appeared from the testimony that the plaintiff in passing the defendant's store in Grand street, in this city, about nine o'clock in the evening of March 1st, 1876, accompanied by some lady friends, offered a piece of candy to the defendant's dog, who was lying down or sitting in front of the defendant's store, and that the dog thereupon sprang at her and bit and lacerated her arm.

The plaintiff introduced evidence to the effect that the dog was of a vicious and mischievous disposition, accustomed to attack and bite mankind, and that the defendant had knowledge of it.

Evidence in contradiction of this was given by the defendant, as well as to the general good character of the dog.

Exceptions were taken to the refusal to strike out certain testimony stated in the opinion, and to the charge of the judge, that the doctrine of contributory negligence does not apply to accidents of this description, and only affects the amount of damage.

Malcolm Campbell, for appellant.

Frank J. Dupignac, for respondent.

Lynch v. McNally.

CHARLES P. DALY, Chief Justice.—After an examination of the numerous decisions that have been cited in the argument, I am satisfied that a cause of action for an injury inflicted by the bite of a dog does not rest, as the defendant insists, upon the ordinary liability for injuries arising from negligence. Where an injury is inflicted willfully to the person, as in assault and battery, or to the character, as in libel or slander, there may be circumstances of great provocation, but they in no way affect the cause of action. They go in mitigation as affecting only the amount that ought to be given as damages. In such actions no such question can arise as to contributory or co-operative negligence; and it is the same in actions to recover damages for an injury arising from the bite of a dog. In cases simply of negligence, no action can be maintained, if the plaintiff, by his own negligence, materially contributed to the accident, as the law will not undertake to apportion the wrong. "In negligence," says Beardsley, J., "whatever may be its grade, there is no purpose to do a wrongful act, or to omit the performance of a duty; there is, however, an absence of proper attention, care or skill. It is strictly nonfeasance, not malfeasance." (*Gardner v. Heartt*, 3 Den. 237.) An action to recover damages for an injury received by the bite of a dog, is an action, however, of a very different character. It is maintainable only when it appears that the defendant harbored or kept the dog that inflicted the injury, after he knew of its vicious propensities, and that it was accustomed to bite human beings or other animals. If a man who keeps or harbors such a dog does not muzzle him, or chain him up, or where the propensity is undoubted, shoot him; but suffers him to go at large about his premises, or in the public thoroughfare, where he is liable at any moment, upon provocation, or without it, to bite passers by, and may, as often happens, inflict a wound with his teeth that will give rise to one of the most dreadful of human diseases—hydrophobia—it shows upon the part of the person keeping a vicious animal of this description such an utter disregard of human safety and of human life that it may be said to partake of the character of a willful wrong, which, in

Lynch v. McNally.

itself, constitutes the cause of action, if an injury has been inflicted by the dog. It is analogous to those cases or actions in which it has been held that where the negligence of the defendant has been so wanton and gross as to be evidence of voluntary injury, the plaintiff may recover, in trespass, although there has been negligence on his part. (*Wynn v. Allard*, 5 W. & S. 524; *Munroe v. Leach*, 7 Met. 274; *Farwell v. Boston, &c. R. R. Co.* 4 id. 49). Negligence, want of care, or circumstances of provocation on the part of the plaintiff go in mitigation, but do not affect the cause of action, which is made out when it is shown that the defendant kept the dog, and, with a knowledge of his vicious propensity, suffered him to go about and inflict the injury. A man has a right to keep a fierce dog upon his premises for the protection of his property. (*Sarch v. Blackburn*, 4 Carr. & P. 297.) And if he is kept during the day securely by a chain, and persons are admonished by a notice put up in the vicinity of where he is, to beware of him; and a person unheeding the admonition, imprudently approaches the dog and is bitten, he has no cause of action; not upon the ground that his own negligence has contributed or co-operated to produce the accident, but because the owner of the dog has done nothing that should make him responsible for the act, he having adopted all precautionary measures to prevent any injury arising from the known disposition and habits of the animal. "If," says Tenterden, Ch. J., in the case last cited, "a man puts a dog in a garden walled all around, and the wrong-doer goes into the garden and is bitten, he cannot complain in a court of justice of that which is brought upon him by his own act."

In *Brock v. Copeland* (1 Esp. N. P. 203), the defendant, who was a carpenter, kept a dog for the protection of his yard; the dog was tied up all day and was at that time very quiet and gentle, but was let loose at night. The defendant's foreman went into the yard, after it had been shut up for the night, and was bitten and torn by the dog. Lord Kenyon held that the action would not lie. He said that every man had a right to keep a dog for the protection of his yard or

Lynch v. McNally.

house; that the injury which this action was calculated to redress, was where an animal, known to be mischievous, was permitted to go at large, and the injury, therefore, arose from the fault of the owner in not securing such animal, so as not to endanger or injure the public; that in the case before him the dog had been properly let loose, and the injury had arisen through the plaintiff's own fault, in incautiously going into the defendant's yard after it had been shut up, and he granted the motion for a non-suit;—a case that pertinently indicates the nature of this action and the ground upon which it rests, to-wit, that the cause of action is founded upon the owner or harbinger of a vicious dog allowing him, with a knowledge of his propensity, to go freely about, and that he has inflicted injury (*Charlwood v. Greig*, 3 C. & K. 48; *Worth v. Gilling*, L. R. 2 C. P. 1), and that it is not essential, in such an action, as it is in ordinary actions for negligence, for the plaintiff to show affirmatively that he exercised due care; that the accident occurred without any fault on his part, but solely through the negligence of the defendant. This fully appears from what was held in one of the earliest cases on this subject (*Smith v. Pelah*, 2 Stra. Rep. 1264), in which Lee, Ch. J., said, that the *scienter* is the gist of the action. In the language of the report, he ruled, “that if a dog has once bit a man, and the owner, having notice thereof, keeps the dog, and lets him go about or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person's treading on the dog's toes; for it was owing to his not hanging the dog on the first notice, and the safety of the king's subjects ought not afterwards to be endangered.” This is conformable to what was said in an earlier case (*Jenkins v. Turner*, 1 Ld. Ray. 109), in which Powell, J., held, that if a man keeps a dog which is accustomed to bite sheep, and the owner knows it, and notwithstanding keeps the dog, and he afterwards bites a horse, it is actionable, because the owner, after notice of the first mischief, ought to have destroyed it or prevented it from doing any more hurt. In *May v. Burdett* (9 Ad. & E., N. S. 101) the objection was taken that the

Lynch v. McNally.

declaration was defective for not alleging *negligence*, or some default of the defendant, in not properly or securely keeping the animal. The question was elaborately argued, and after an exhaustive examination of precedents,—ancient and modern—the conclusion of the court was, that the declaration was good without any such averment. The conclusion, Lord Denman said, to be arrived at from a consideration of the cases was, that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that he is so accustomed, is *prima facie* liable on an action in the case at the suit of any person attacked and injured by the animal, without any averment of negligence on the part of the defendant; that the gist of the action is the *keeping* the animal after *knowledge* of its mischievous propensities. He said that the precedents, both ancient and modern, with scarcely an exception, merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care. He referred to two early cases in the Register where the cause of action stated in both precedents was simply the propensity of the animals; the knowledge of the defendant and the injury to the plaintiff, and that there was no allegation of negligence or want of care. He finally said that the conclusion to be arrived at from the examination of all the authorities was, that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and says that the case of *Smith v. Pelah*, above referred to in Strange, puts the liability upon the true ground. That if the injury was solely occasioned by the willfulness of the plaintiff, after warning, that it might be a ground of defense, by a plea in *confession* and *avoidance*; but that it was unnecessary to give any opinion upon that point. In *Card v. Case* (5 Man. Gr. & Sc. 622) the preceding case was approved, and it was held that in an action of this description, the plea of not guilty puts in issue only the ferocity of the dog and the *scienter*, these matters forming the substance of the charge or ground of action. In that case, it was averred that it was the duty of the defendant to use due and reasonable care and precaution in and about the

Lynch v. McNally.

keeping and management of the dog, and that he neglected to do so. This averment in the declaration the court held was idle and superfluous; that no issue could be taken upon it; that the assertion of the defendant's keeping the animal negligently was not essential; but that the gravamen of the action is the keeping of a ferocious animal, knowing its propensities, and the consequent injury to the plaintiff.

These last three cases are cited and approved in the opinion of the Court of Appeals in *Kelly v. Tilton* (2 Abb. Ct. App. Cas. 499) as authoritative expositions of the law, and the previous decision of the Supreme Court, in *Loomis Terry* (17 Wend. 496) was substantially to the same effect; that if the defendant knowingly and wrongly suffers a vicious and ferocious dog, by whom the injury is inflicted, to go freely about his grounds, it is actionable, though there may have been negligence on the part of the plaintiff. In that case the defendant, after knowledge of the fact that his hound had attacked a man on horseback, caught him by the foot, and left the print of his teeth in the man's boot, allowed the animal to go freely over his grounds in the daytime. The action was brought to recover damages for an injury received by the plaintiff's son, who went into the defendant's woods to hunt for wild animals, where the defendant's hound sprang upon him, and the hound being joined by a slut of the defendant's, the boy was severely bitten. Although it was conceded that the plaintiff's son was a trespasser in going upon the defendant's premises, and it was also shown, in addition, that he had been cautioned not to go where the slut and her puppies were, as the slut was cross and might bite him, the puppies being in a hollow log in the woods, about twenty-five rods from the place where the boy was attacked; yet the court sustained the judgment for the plaintiff upon the ground that it was a wrongful act for the defendant to allow such an animal to go at large over his premises in the daytime; that it was an act involving human safety and perhaps human life; that he was not justified, even as against trespassers, in allowing such a fierce dog to go without putting up a warning or notice, and the court,

Lynch v. McNally.

in their opinion, dwell especially upon the fact that he made no effort to restrain the animal from attacking his neighbor, but, on the contrary, when he heard of the injury to the boy, expressed his regret that the dogs had not eaten him up. In *Jones v. Perry* (Peake's Evidence, 355, Am. Ed., 2 Esp. R. 482) the dog was tied up in the defendant's cellar, but the rope or chain was of such length that it suffered him to go as far as the curbstone on the opposite side of the street. He broke through a wicker gate into the street, when a child coming up to him irritated him with a stick, upon which he flew at the child, bit him, and the child afterward died of hydrophobia. It appeared that there was a report in the neighborhood that the animal had been previously bit by a mad dog, but there was no evidence that the defendant knew it, or knew the animal was vicious; but, on the contrary, the evidence was that the dog, until a very short time before the accident, went in common about the streets and was very good tempered and tractable. But Lord Kenyon said that the defendant showed a knowledge that the animal was fierce, unruly, and not safe to be permitted to go abroad by the precaution that he took to tie him; that what he had done had not been sufficient, and through his not securing the animal properly the injury had happened. He accordingly held, that the plaintiff was entitled to recover. Here it was shown not only that the dog had been irritated by the child with a stick, but the circumstance relied upon to show that the defendant knew that the dog was dangerous was a very slight one. The decision, however, was by a very eminent judge, and the case was cited and relied upon by the Supreme Court, in *Loomis v. Terry* (*supra*), in support of the conclusion there arrived at. In many of the cases where the question arose whether the action could be maintained, the court certainly treated it as if it depended upon whether the injury arose through the plaintiff's or the defendant's negligence, and in some of them, it is said, that if there was negligence on the part of the plaintiff, he could not recover (*Earhart v. Youngblood*, 27 Pa. St. 331), or if by common care, the dog might have been avoided. (*Curtis v. Mills*, 5 Car.

Lynch v. McNally.

& Pay. 489; *Munn v. Rede*, 4 Allen, 431; *Coggswell v. Baldwin*, 15 Verm. 404.) And in some of the cases like *Loeb v. Link* (4 E. D. Smith, 63), there was no cause of action, the defendant having done all that he could be required to do in keeping the dog securely. The observations, however, were loosely made, without that careful investigation into the nature of the action which was had in the other cases referred to. It is very clear, upon a review of all the cases, that as respects the cause of action, it does not depend either upon the plaintiff or the defendant's negligence, but upon the fact that the defendant, with a knowledge of the vicious propensities of the animal which he kept or harbored, suffered it to go at large, and that it inflicted the injury for which the action is brought. The ruling of the judge, therefore, upon the trial was correct, that contributory negligence in no way affected the cause of action, but was only for the consideration of the jury in determining the damages to be awarded to the plaintiff.

The plaintiff testified upon the direct, without objection, that she had expended \$20 for medicine and besides that had to borrow \$20. The defendant, in cross-examining her, returned to the subject of the \$20, and having elicited substantially the same statement as she had made upon the direct, moved to strike out that part of the testimony, which motion was denied. If he desired to strike out the answers to her questions upon the cross-examination, the granting of his motion would not have shut out this testimony, as it was already in on the direct, and if he desired to reach the testimony upon the direct, his motion was too late, as he should either have objected to the questions which brought out this testimony on the direct, or if it was not responsive to the questions put, he should have moved at the time to strike it out. In addition to which I do not see how it could have the effect of allowing the jury to charge the amount twice, as the defendant claims. It was, in effect, testifying that she had expended \$20 for medicine, and had to borrow the money. This is what I understand her statement to have been, taking her direct and cross-examination together; or that having ex-

Lynch v. McNally.

pended \$20 for medicine, she had, in addition, to borrow \$20 more for the further purchase of medicine and for her support; but if there is any doubt on this point, it constitutes no ground for granting a new trial, as the plaintiff can remit that amount from the damages recovered, with the consent of the court. There is no ground whatever for granting a new trial upon the assumption that the verdict is unsupported by evidence, or is against the weight of evidence, as respects the vicious character of the dog, and the defendant's knowledge of his propensities before the plaintiff was bitten by him. The testimony was conflicting upon this point; but we must assume, in support of the verdict, that the jury believed the plaintiff's witnesses and disbelieved those of the defendant. The plaintiff's witnesses testified not only that the dog had previously bitten three persons in the street, before he bit the plaintiff, and that the defendant not only had a knowledge of these facts, but that he was remonstrated with by two policemen, and without effect; that he was told by one of the policemen two weeks before the plaintiff was bitten, that he ought to keep the dog down stairs, or muzzled and tied up; that he spoke to him two or three times about the animal; that he told him every time he spoke to him about the dog's growling at persons when they were passing by; that he was a vicious dog, and he ought to keep him within, or, as the witness expressed it, below. This policeman had known the dog for a year. He swore that he saw him frequently in front of the store, and that upon one occasion the dog growled and ran at him, and that he had to give him a wide berth by going over to the other side of the street.

The other policeman testified that he knew that the dog was not safe to let loose in the streets; that on two occasions before the biting of the plaintiff, he notified the defendant that the dog had bitten two persons; that upon one occasion he saw him bite a man—a rag-picker—catching him by the pantaloons, and tearing them down about the man's leg. That this policeman then told the defendant that if he caught the dog on the street again he would kill him; and the defendant's response was that the dog would not hurt

Lynch v. McNally.

anybody, that he was only playful; that he told the defendant that he had better tie him up, and he took him in the back part of the store; but the week after that he caught another man; that the defendant then locked him up in the store, but he was out a number of times. The witness again saw the dog catch a man by the coat-tail, and tear his coat; that he reported this occurrence to the defendant, and asked to have the dog killed, and the defendant's reply was that the dog would not hurt anybody, and that he would not take \$100 for him; to which the policeman answered, "You had better take care of him, or he will get you in trouble." It further appeared that the animal bit a boy who was picking pins in the street; a fact of which the defendant was informed at the time. The boy was in the street between the car-track and the gutter, when the animal sprang at him and bit him, the teeth entering the boy's flesh. This was ample and most conclusive evidence, both of the vicious character of the dog and the defendant's knowledge of his disposition. The defendant denied, and testified, to express it in his own language: "He was just as gentle as a little baby that would be on its mother's breast." The jury evidently did not believe him, but believed the witnesses for the plaintiff, and that is a conclusion and finding which cannot be reviewed here. The judgment should be affirmed with costs.

VAN HOESSEN and JOSEPH F. DALY, JJ., concurred.

Judgment affirmed, with costs.*

* This decision was affirmed by the Court of Appeals, April 16th, 1878.

The Merchants' Loan and Trust Co. v. The Bank of the Metropolis.

**THE MERCHANTS' LOAN AND TRUST COMPANY, Respondent,
against THE BANK OF THE METROPOLIS, Appellant.**

(Decided April 2d, 1877.)

In an action against a bank, on its certification of a check in the hands of an innocent holder for value, it is no defense that the check was procured from the maker without value, and by fraud, or that the name inserted by the maker, to designate the payee is fictitious, if the person whom the maker intended should under that name be paid under that name procures the certification, and under that name, and by the aid of that certification, procures the plaintiffs' money.

The statute as to notes made payable to the order of a fictitious person, considered and discussed.

APPEAL from a judgment entered upon a decision of the general term of the Marine Court of the City of New York, affirming a judgment rendered by that court at a trial term.

The trial was by the court, a jury having been waived.

This action was brought by the Merchants' Loan and Trust Company, to recover the amount of a check, certified by the defendant, which amount the plaintiff had paid to the person to whom the check was given, and who had obtained the certification. The real name of this person was Charles F. Stearns, but the makers, Messrs. Steinway & Sons, at the time of making the check, the defendant at the time of certifying it, and the plaintiff at the time of paying it, supposed his name was F. W. Frothingham, which last name was inserted by the maker in the check as the name of the payee. The check was obtained from the makers by the person who called himself Frothingham, by fraud and deceit, but of this defendant was not aware at time of certifying, or plaintiff at time of paying the check. The check when offered for payment was indorsed "F. W. Frothingham."

G. W. Cotterill, for appellant.

Wm. Henry Arnoux and *Wm. F. McRae*, for respondent.

The Merchants' Loan and Trust Co. v. The Bank of the Metropolis.

CHARLES P. DALY, Chief Justice.—One Charles F. Stearns went several times to the place of business of Steinway & Sons, piano manufacturers, of this city, and after pricing and looking at pianos, selected a piano, the price of which was \$425. After he had selected it, the salesman brought him to Mr. Steinway, the principal of the establishment, and Stearns offered him a draft, drawn by the National Bank of Commerce, of New London, Connecticut, upon the Marine National Bank, of this city, payable to the order of F. W. Frothingham, for \$10, which, when presented to Mr. Steinway, by Stearns, had been fraudulently altered, or, as it is technically termed, "raised," from \$10 to \$325. Stearns told Mr. Steinway that he was F. W. Frothingham, and that he was a provision dealer, doing business at New London, Connecticut, where the draft was drawn, and Mr. Steinway, believing him to be F. W. Frothingham, to whose order the draft was made payable, and considering the draft good, as it was drawn by one bank upon another, and having no suspicion that it had been altered from \$10 to \$325, received it in payment for the piano, and gave Stearns his own check upon the bank of the Metropolis (the defendant), for the difference, \$400, payable to the order of F. W. Frothingham; upon which Stearns gave directions in writing for the shipment of the piano, and then went to the Bank of the Metropolis and presented Mr. Steinway's check to the paying teller for payment, which was not then indorsed, and the paying teller told him that he would have to be identified. Stearns said he knew Mr. Steinway personally, and would get him to identify him by indorsement. He then went out, and after being away about 10 minutes, returned saying that he did not like to ask Mr. Steinway to identify him, and asked the teller if he would not pay him, that he was the person, F. W. Frothingham, to whom the check was payable, and the teller said no, that he must be identified personally by Mr. Steinway, or by the indorsement of some one known to him, the teller, and who was responsible. Stearns then asked him to certify the check, which the teller did, and Stearns left with the check. In the meanwhile, Mr. Steinway sent the

The Merchants' Loan and Trust Co. v. The Bank of the Metropolis.

draft to the Marine National Bank to ascertain if it was good, and learned from the teller of that bank that it had been altered from \$10 to \$825, upon which Steinway immediately went to the Bank of the Metropolis to stop the payment of his check, where he arrived very soon after Stearns had left, and learned that the check had been certified. He gave the teller a description of the man to whom he had given his check, and found that it coincided with the person who had presented it at the bank and got it certified.

Stearns then went to Paterson, N. J., and upon the same day, presented the check at the plaintiff's bank; the check being there indorsed with the name of F. W. Frothingham, and where he was introduced by Mr. Whitlock, who had known Stearns in Boston, but had forgotten his name; Whitlock being known to the treasurer of the plaintiff's bank, he having been in its employment for years. Being thus introduced, and the check having been certified, the treasurer paid Stearns the amount of it. It appeared by the evidence that the indorsement of the name F. W. Frothingham was in the same handwriting as the written directions given by Stearns to Steinway for the shipment of the piano, warranting the conclusion that Stearns had indorsed that name on the check. Stearns was afterwards arrested and indicted for the felonious alteration of the draft, and pleading guilty, was sentenced to the State prison.

The plaintiff sent Steinway's check to the defendant's bank, and the defendant refusing to pay it, this action was brought.

The court below gave judgment for the plaintiff; and the general term of the Marine Court, I think, correctly affirmed the judgment. The check was paid to the person to whom Steinway meant it to be paid, whom he believed to be the F. W. Frothingham to whom the draft was made payable. The plaintiffs are innocent parties, who acted in good faith, in paying the amount of the check, which the defendants, by their paying teller, had certified to be good; and which the plaintiffs paid to Stearns, believing him, as Steinway believed him to be, F. W. Frothingham.

The Merchants' Loan and Trust Co. v. The Bank of the Metropolis.

If one of two innocent parties must suffer by the act of the third, he who has enabled the third party to do what he did should sustain the loss. (*Lickbarrow v. Mason*, 2 Term. Rep. 63; *Rawls v. Deshler*, 4 Abb. Ct. App., Dec. 16, 17.)

The defendants were justified in certifying the check, as the signature was genuine, and they had funds of Steinway's in their hands. If they, instead of the plaintiffs, had paid the check when it was presented, they would have been entitled to charge the payment to Steinway, as they would then have paid it to the person to whom Steinway meant it to be paid, whether his name was F. W. Frothingham or not; and if they, by certifying it, are compelled to pay it to the plaintiffs, who received and discounted it, upon a certificate that the signature was genuine, and that the defendants had funds of the drawer in their hands to meet it; they have the right, in turn, to hold Steinway accountable as the one who should be ultimately responsible for the loss.

It is not strictly the case of a check drawn, payable to a fictitious person, as Steinway believed the person to whom he gave the check to be F. W. Frothingham, and the one to whose order he made it payable. If "F. W. Frothingham" was, as it may have been, a fictitious name, the plaintiffs, as innocent holders of the check, would be entitled to recover. In *Coggill v. The American Exchange Bank* (1 N. Y. 117), Judge Bronson, after stating that it is well settled that when a man draws and puts in circulation a bill which is payable to a fictitious person, the holder may recover upon it as a bill payable to bearer, considers the question whether, when the action is against the acceptor of such a bill, it must appear that he knew that the payee was a fictitious person, and declares that he can see no reason for laying down such a rule; that it is enough that the holder has a good title to the bill, so that the acceptor, on paying it, can properly charge the amount against the funds of the drawer in his hands, if there be any; and if there be none, then he may have an action against the drawer for money paid to his use. The statute declares that "notes made payable to the order of a fictitious person shall, if negotiated by the maker, have the same effect

The Merchants' Loan and Trust Co. v. The Bank of the Metropolis.

and be of the same validity as against the maker, and all persons having knowledge of the facts, as if payable to bearer." I see nothing in this provision of the statute which is in conflict with the view of the law taken by Judge Bronson. It is simply affirmatory of the law as it previously existed; that such a note should have the same effect as if payable to bearer against all having knowledge of the facts. A remark of Judge Ingraham, in *Maniort v. Roberts* (4 E. D. Smith, 85), that "the statute makes the transfer of such a note valid against persons knowing the name to be fictitious, but *in no other case*," might be construed as implying the contrary; although it is but a statement of *that extent* of the statutory enactment. But if, as the defendants construe it, it means that there can be no recovery upon such a note in any other case, then such a remark or opinion was *obiter*, not being necessary to the decision in *Maniort v. Roberts*, in which the judgment of the court below was reversed because the evidence was not sufficient to warrant the conclusion that the name of the payee was that of a fictitious person; and the facts of the case show that it was not the intention of the maker to make the note payable to De Bucke, the person from whom he purchased the goods, but to F. Cornelius, the person to whose order he made the note payable; it appearing from the evidence that De Bucke, the person to whom it was delivered, acted as an agent in selling goods for others.

In an earlier case in this court, in which I participated, *The American Exchange Bank v. The City Bank*, decided in 1846 (5 Legal Observer, 18), we held that where a check was obtained from the drawee of a draft on a forged indorsement, and the check was made payable to the individual who forged the indorsement, but in a false name, who indorsed the fictitious name upon the check, and passed it away to a third person for value, who presented it to the bank on which the check was drawn, and received the money for it; that he was entitled to hold the money he had received, and that the bank could not recover it back from him.

I think the whole of the defendant's argument is answered

Sternack v. Brooks.

by the simple fact in this case that the check was paid to the person to whom Steinway meant that it should be paid, and whose name he supposed to be F. W. Frothingham,

The judgment of the general term of the Marine Court should therefore be affirmed.

VAN HOESSEN and JOSEPH F. DALY, JJ., concurred.

Judgment affirmed.

CHARLES STERNACK, Plaintiff, *against* JOHN E. BROOKS,
Defendant.

(Decided April 2d, 1877.)

In order to justify a policeman in the city of New York in arresting a person without a warrant, or to justify one procuring such arrest, the act for which the arrest is made, whether it be regarded as constituting or tending to a breach of the peace, must be committed in the immediate presence of such officer.

The case of the Master Stevedores Association v. Walsh (2 Daly, 1) as to the extent to which trades associations can legally go in controlling the rate of wages considered, and its authority said not to be affected by the act of 1870 (L. 1870, c. 19) concerning the peaceable assembling of workmen.

MOTION for new trial on case and exceptions ordered by the court at trial before Judge ROBINSON and a jury, to be heard in the first instance at general term. The facts sufficiently appear in the opinion.

Daniel R. Lyddy, for plaintiff.

Payson Merrill, for defendant.

VAN HOESSEN, J. This is an action for false imprisonment. The defendant is one of a firm of clothiers, doing business on the corner of Broadway and Bond street. An association of journeymen tailors had organized a strike, and, for the purpose of bringing the defendant's firm to terms,

Sternack v. Brooks.

had detailed a number of the strikers to station themselves upon the sidewalk in front of the defendant's shop, with a view to intercept workmen entering into, or departing from the shop, and prevent them continuing in the defendant's employ. The strikers upon the sidewalk, who were, to use their own language, picketing the defendant's establishment, employed appeals and arguments, and also epithet and sneer, to deter journeymen from working for the defendant's firm. On the occasion of the plaintiff's arrest, he was not picketing. He had previously acted as a picket, but at the time he was arrested he had just left a neighboring tap-room, and approached an acquaintance who was on picket duty, for the purpose of conversation. The defendant at that moment sallied from the door of his shop, and directed a policeman who accompanied him, to arrest the plaintiff. It does not appear that if the plaintiff, at the time of the arrest, was in the actual commission of any offence at common law, or of a violation of the Metropolitan Police Act (chap. 259, act of 1860, secs. 29 and 30; act of 1867, chap. 806, sec. 14) or of any other statute, such offence was committed in the presence of the policeman who made the arrest. The extent to which associations to control the rates of wages may lawfully go is clearly pointed out in the exhaustive opinion of Chief Justice Daly, in the *Stevedores' case* (2 Daly, 1); and the authority of that case is not affected by the act of 1870, chap. 19, respecting the lawful and peaceable assembling of workmen.

It may be that picketing was an unlawful and dangerous assemblage, obstructing the free passage of the public sidewalk, and that plaintiff, being engaged in the general business of accosting and intimidating defendant's workmen, was guilty of a violation of the police act cited when he went to the place where the picket was stationed, and there stopped to confer with the picket, if it can be inferred from the circumstances that his act was a part of the general scheme of intimidation and interference. But we are of the opinion that such an act must be committed in the immediate presence of a policeman, in order to justify an arrest without

Paul v. The Mayor, Aldermen and Commonalty of the City of New York.

warrant by the officer, or to justify a person in giving the offender in charge, and this, whether the act be regarded as a breach of the peace, or as conduct tending to a breach of the peace. (*Boyleston v. Kerr*, 2 Daly, 220; *Willis v. Warren*, 1 Hilt. 590.) Upon the state of the evidence at the close of the plaintiff's case sufficient did not appear to justify an arrest without warrant, under the authority of the cases cited; and the defendant should have been called upon to show that the acts alleged by him to constitute a violation of the law were committed in the presence of the officer making the arrest.

The exception to the dismissal of the complaint is sustained, and a new trial is ordered, with costs to abide the event.

CHARLES P. DALY Ch. J., and JOSEPH F. DALY, J., concurred.

New trial ordered, with costs to abide event.

JOHN PAUL, Respondent, *against* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellants.

(Decided April 2d, 1877.)

The Corporation of the city of New York is not liable to pay interest on interest-bearing claims against it for the period between the time when by their terms they become due and the time when payment is demanded; and the rule as to a private debtor, that to stop interest he must seek and make tender to his creditor, does not apply to a municipality

APPEAL from an order made at special term by Judge JOSEPH F. DALY, denying a motion made by the defendant to vacate or reduce the amount of a judgment entered against it.

The facts are stated in the opinion.

Wm. C. Whitney and D. J. Dean, for appellants.

John B. Leavitt, for respondent.

Paul v. The Mayor, Aldermen and Commonalty of the City of New York.

VAN HOESSEN, J.—This is an appeal from an order denying a motion to vacate a judgment, or to reduce it in amount. The judgment was by default, and was entered in an action brought against the city of New York for the recovery of the amount due upon a certificate of indebtedness, issued by the town of Morrisania, which, by act of the Legislature, has become part of the city of New York. The certificate bears date June 14, 1873, and promises the payment of three hundred dollars, with interest from date. The stipulated time of payment is when the assessment for grading Concord avenue shall have been collected, or at all events, one year from the date of the certificate. On the 14th day of June, 1874, one year after its date, the certificate, principal and interest, was due and payable. As to this there is no dispute. Before the arrival of the day last mentioned, all the liabilities of the town of Morrisania became, by legislative act, liabilities of the city of New York. The plaintiff refrained from demanding payment from the city until the 30th day of September, 1876, and the question to be decided is, whether the city is liable to pay interest on interest-bearing claims for the period between the time of their maturing and the time when payment is demanded? In other words, may the holder of a city obligation, which by its terms bears interest, withhold the presentation of the obligation when it becomes due and payable, and thereby compel the city to pay him interest for a time limited only by his own convenience? If the city is to be regarded as a private individual, the answer must be in the affirmative, but if it is to be considered as a part of the government established by the people for the administration of their public affairs, the answer must be in the negative. There is a reason for the difference between the rule applicable to a private person and that applicable to a State. A private debtor is bound to seek out his creditor, and to tender the amount of the debt. If he performs that duty, he may, at any time after the maturity of the debt, stop the accruing of interest. The State, however, is not bound to seek out its creditor. It may lawfully wait till he presents himself and his claim. (*People v. Canal Commissioners*, 5 Denio, 404, 405.) It is unnecessary to repeat

VOL. VII.—10

Paul v. The Mayor, Aldermen and Commonalty of the City of New York.

the reasons stated by the court in the case just cited why the State should not be compelled to seek out its creditors.

Those reasons apply to the city of New York with as much force as to the State. The magnitude and extent of the business of the various departments of the city, the complex system of government provided by the legislature, the independence and the powers of the various boards of commissioners, and the absolute necessity for checks and safeguards against fraudulent claims, render it impossible for the city to search out its creditors, and to tender each man, wherever he may be, the amount of his demand. Fortunately, the Court of Appeals has already spoken on the subject, and has said in the case of *Taylor v. The Mayor, &c.* (unreported): "The city government is not required to seek out those who have claims against it, and pay them even when due." As I have already said, the duty of a private person to pay interest on a past due liquidated demand, followed from his neglect to relieve himself from the burden by seeking out his creditor. If the duty to seek out the creditor does not exist, the debtor is in no default, and cannot be called upon to pay interest until the creditor makes demand upon him. It follows, therefore, that the plaintiff should have presented his claim at the time it became due and payable, namely, on the 14th day of June, 1874, and that he is not entitled to interest between that date and the 30th day of September, 1876, the day he demanded payment of the Comptroller.

The order appealed from should be reversed with costs, and the judgment should be reduced by deducting therefrom the sum of forty-eight dollars.

CHARLES P. DALY, Ch. J., concurred.

Order reversed, and ordered that judgment be reduced.

Easton v. Malavazi.

CHARLES A. EASTON *et al.* Appellants, *against* NICHOLAS
MALAVAZI, Respondent.

(Decided April 2d, 1877.)

Where the affidavits upon which a warrant of attachment is granted state facts and circumstances which have a legal tendency to make out the essential statutory facts required to be shown, and fairly call upon the magistrate to whom the application for the warrant is made to exercise his judgment on the sufficiency of the evidence, this is enough to give the magistrate jurisdiction to issue the warrant and to sustain it in case it is attacked on the ground that the facts stated do not make a case within the statute.

The rule is the same whether the warrant is attacked in a collateral proceeding as being void for want of jurisdiction, or whether a direct application to set it aside is made in the action in which it was granted.

Where the essential statutory fact to be shown was concealment with intent to avoid service of a summons;—*Held*, that affidavits alleging absence of the defendant from his usual place of business and resort soon after the debt had been demanded of him, coupled with his refusal, when asked by plaintiff to give his address or residence, contained enough to fairly call upon the magistrate for the exercise of his judgment upon the evidence.

APPEAL from an order made at special term by Judge JOSEPH F. DALY, granting a motion to vacate an attachment.

The motion was made on the papers upon which the warrant of attachment was granted. The facts are stated in the opinion.

Sherwood & Howland, for appellants.

Geo. C. Holt, for respondent.

CHARLES P. DALY, Chief Justice.—The attachment was granted upon what was deemed by the judge who made the order satisfactory evidence, by affidavit that the defendant kept himself concealed in the city, with intent to avoid service of a summons, and it was vacated upon the ground that there was not sufficient upon the face of the affidavit to show

Easton v. Malavazi.

prima facie that the defendant had concealed himself with such an intent. An attachment cannot be vacated if there was enough in the affidavit to give the judge who made the order jurisdiction; and if the facts and circumstances stated in it had a legal tendency to make out the charge, and fairly called upon the officer for an exercise of his judgment, upon the sufficiency of the evidence, the attachment cannot, even if his conclusion was erroneous, be vacated on the ground that it was void for want of jurisdiction. This has long been the settled rule in this State. It was doubted, however, whether this was the rule where the sufficiency of the affidavit was brought up directly by a motion to set it aside in the court where it was granted, or where the sufficiency of it came up for review upon appeal. It was supposed that this was the rule only where the question arose collaterally in an action or proceeding in which the attachment was claimed to be void for want of jurisdiction. In *Skinnion v. Kelly* (18 N. Y. 355), it was said by Johnson, Ch. J., that if the proof in the affidavit had a legal tendency to make out a case under the statute, although it were so slight and inconclusive that it would, upon a direct proceeding be reversed; yet, in a collateral proceeding or action, it would be deemed valid, because, although the decision might be erroneous, it was not void. This distinction, however, has been repudiated by the Court of Appeals in the recent case of *Schoonmaker v. Spencer* (54 N. Y. 366), in which it was distinctly held, seven of the judges concurring, that the rule was the same whether the question of the sufficiency of the affidavit arise in a direct or a collateral proceeding, so that all doubt on this point may now, in this State, be regarded as at an end. It was said by Denio, J., in *Van Alstyne v. Erwine* (11 N. Y. 340, 341), that the law has committed to the judge who grants the attachment the duty of determining as to the cogency of the proof; that, were it otherwise, it would render such proceedings extremely hazardous, not only to the parties setting them on foot, but to the officers concerned in their execution; for when we determine that a sufficient case was not made out for the exercise of the judgment of

the officer, we must consider the judge and all the parties trespassers in whatever they do ; that a liberal indulgence therefore must be extended to those proceedings, even upon questions of jurisdiction, if we would not render them a snare rather than a beneficial remedy, which was in accordance with the previous decision of the Supreme Court in the matter of *Faulkner* (4 Hill, 589), in which it was held that it was sufficient if there was enough in the affidavit to call upon the officer for the exercise of his judgment upon the sufficiency of the evidence ; that if he erred in his decision upon a question thus fairly presented, it would not be fatal to the proceeding ; that it was only when there was a total want of evidence upon an essential point that there would be a failure to acquire jurisdiction. And the rule may be pertinently illustrated by what was said by Harris, J., in *Niles v. Vanderzee* (14 How. Pr. 547), that he was not at liberty to set aside the attachment, even though he might be satisfied that it ought not to have been granted.

The circumstances set forth in the affidavit in this case were slight, but they were sufficient, in my judgment, to give the judge who granted the attachment jurisdiction. It was stated that the defendant visited the plaintiff's place of business daily, and wrote and received letters, and transacted his business there ; that the plaintiff King, who made the affidavit, believed from his conversation with the defendant, that that was the only place where the defendant attended to his monetary and business affairs ; that during this period the defendant was accustomed to frequent the Cotton Exchange, in this city, nearly every day, and that he, the deponent, was well acquainted with the places visited by the defendant and his habits during business hours ; that, on the 8th of November, 1876, the defendant became indebted to the plaintiffs in the sum of \$899 59 upon cotton purchased by them for him ; that, on the 8th of November aforesaid, they requested him to pay the amount, and that he promised to do so ; that they frequently requested him to pay it and that from time to time he promised to do so ; that on December 1st the plaintiffs determined, after

Easton v. Malavazi.

advising with counsel, to sue the defendant, and about that time conversed with him about the payment of this amount, and at the same interview asked him where he resided, and that he refused and declined to give his address or say where he resided; that, after the 1st of December, the defendant visited the plaintiffs' place of business but once, when he came for his letters. The affidavit was made on the 14th of December, and the plaintiff King who made it, states that since the 1st of December he had searched and looked for the defendant; that he made inquiries concerning his movements and whereabouts at the places usually visited by him, to get such information as would secure the service of a summons upon him, but was informed, at said resorts, that since the 1st of December he absented himself therefrom, except on rare occasions and at unusual hours. There is also the affidavit of the plaintiff's book-keeper, made also on the 14th of December, which is confirmatory of what is stated in the plaintiff King's affidavit, and states, in addition, that the book-keeper received the summons in this action to serve it upon the defendant, and that he made every effort to find him, by calling at places where he was formerly to be found, and making inquiries for him; and if possible to learn his place of residence, but was unable to find him, and both the plaintiff King and the book-keeper swear, after their respective statements, that the defendant keeps himself concealed within this State, with intent to avoid the service of a summons.

Some of the statements in both affidavits are liable to the objection that they are rather conclusions on the part of the witnesses than a statement of the facts upon which the conclusions are founded; and it may be that the evidence is very slight; but, in my opinion, neither the judge who vacated the attachment nor this court would be warranted in saying judicially that there was nothing in the affidavits having a legal tendency to show a concealment with the intent charged. It is said in the prevailing opinion, in *Schoonmaker v. Spencer* (54 N.Y. 369), before referred to, "that in order to defeat the jurisdiction of the justice, it must be

Easton v. Malavazi.

made to appear that there is a total want of evidence upon some essential point." The essential point, in this case, is a concealment, with intent to avoid the service of a summons; and, applying this test, it cannot, I think, be said, that there is a total want of evidence in the affidavits, upon this point. They show that the defendant was indebted to the plaintiffs in a large sum of money; that he was asked to pay it when the obligation was incurred and promised to do so; that for three weeks afterwards it was frequently demanded of him, but he neglected to pay it; that he then absented himself from the plaintiffs' place of business, where he was in the habit of going every day, to receive and write his letters, and transact his business, except upon one occasion, when he came to get his letters; that he could not be found thereafter at the Cotton Exchange and places of business in its vicinity, which he was accustomed to visit and frequent nearly every day, although both the plaintiff King and the plaintiffs' book-keeper searched and made inquiries for him at these places, to learn his whereabouts or residence, without being able to find him or to learn his residence. This, coupled with the fact that on the last occasion but one when he came to the plaintiffs' place of business, he refused, when requested, to give his address, or say where he resided, was, I think, evidence tending to show a concealment with the intent charged, and enough to call for an exercise of the judgment on the part of the judge who granted the attachment. It was enough, at least, to give him jurisdiction, and, instead of vacating the attachment for want of jurisdiction, the defendant should have been left to his motion to discharge it upon affidavits controverting the facts in the plaintiffs' affidavit, or explaining the circumstances, from which the judge who granted the attachment inferred that the defendant had been concealing himself with the intent charged.

I think, therefore, that the order vacating the attachment should be reversed.

VAN HOESEN and LARREMORE, JJ., concurred.

Order reversed.

Krekeler v. Thaule.

MARGARET M. KREKELER, Appellant, *against* HENRY W.
THAULE *et al.* Respondents.

(Decided April 2d, 1877.)

A trustee who has taken lands under a deed from a husband in trust to convey to his wife, or her appointee, cannot, after having conveyed to the appointee, and after the appointee has conveyed to the wife, obtain any right, by forcibly taking those deeds from the wife's possession, to hold the property until he is repaid by the wife expenses incurred by him as trustee, nor is he entitled to a personal judgment against the wife therefor. Such a trust is executed, and ceases when a proper deed has been executed and delivered to the appointee, although the deed may not have been recorded.

APPEAL from a judgment of this court, entered on a decision made at special term by Judge LOEW, requiring the plaintiff to pay the defendant Thaule \$906 92, and that upon such payment the defendants should execute deeds of certain lands to plaintiff.

The action was brought to have adjudged fraudulent and void two deeds of certain land in New York City; one deed having been made by the defendant Thaule to the defendant Heinecke, and the other having been made from Heinecke to the third defendant, Wessel. The complaint asked also a judgment for damages.

The complaint alleged that the defendant Thaule, on August 9th, 1870, conveyed the land by deed to one Maria Stoddart; that on August 13th, 1870, Maria Stoddart conveyed by deed to plaintiff; that on April 15th, 1871, the defendants Thaule and Heinecke conspired to cheat plaintiff, and with that intent Thaule forcibly took from plaintiff the two last mentioned deeds, and afterwards, on April 18th, 1871, conveyed said land by deed to the defendant Heinecke, and recorded the same; that afterwards the defendant Heinecke, by direction of Thaule, conveyed by deed to the defendant Wessel; that this deed was recorded, and that the considerations for these two deeds were "pretended," and that Wessel knew when he took his deed that plaintiff was in possession, claiming under her title from Maria Stoddart.

Krekeler v. Thaule.

The defendant Thaule admitted making a contract of sale of the land with Maria Stoddart; alleged that Maria never performed the agreement on her part, and denied the other allegations of the complaint. The answer of Wessel alleged that he bought the land in good faith, and for value paid, before knowledge of plaintiff's claim, and denied any knowledge as to the other allegations of the complaint.

The court, at special term, on these issues, found as facts, that prior to August 1st, 1870, the land in question was conveyed to the defendant Thaule, in trust for the plaintiff; that Thaule conveyed as aforesaid to Heinecke, and Heinecke to Wessel; that the defendants in open court offered to allow judgment that the defendants convey all their interest in the land to plaintiff, upon plaintiff's paying or securing payment of all expenses Thaule had incurred by reason of the trust. The court further found as conclusions of law and adjudged that plaintiff pay the defendant Thaule his expenses on account of the trust, and the costs of the action, and that upon such payment of the expenses the defendants execute deeds of the land to the plaintiff. A reference was also ordered, to hear and determine the matter of expenses, and upon his report judgment for the amount reported and costs was entered.

Peter Mitchell, for appellant.

D. M. Porter, for respondents.

VAN HOESSEN, J.—William Krekeler, the husband of plaintiff, conveyed to the defendant Thaule the house and lot known as No. 414 East Eleventh street, under an agreement that Thaule should convey the property to the wife of Krekeler, the plaintiff, or to such person as she might designate. William Krekeler was embarrassed, and, though the question does not arise here, it is obvious that the title was placed in Thaule's name for the purpose of baffling Krekeler's creditors. Within a few days after the conveyance to him, Thaule conveyed the property to one Maria Stoddart, the nominee of Mrs. Krekeler, and Stoddart forthwith con-

Krekeler v. Thaule.

vayed it to the plaintiff. The plaintiff never placed upon record the conveyance from Thaule to Stoddart, or the conveyance from Stoddart to herself.

The agreement or trust under which Thaule received and held the property was fully executed, and it terminated when Thaule executed the conveyance to Maria Stoddart. The records still showed, however, that Thaule was the owner of the property, and there is no doubt that he was willing to lead the creditors of Krekeler to believe that he was the actual owner, though he had parted with even the nominal interest he had acquired through Krekeler's deed to him. Thaule permitted actions to be brought and defended in his name, and in those actions costs and expenses were necessarily incurred, part of which were paid by him.

Thaule demanded reimbursement for those costs and expenses from Krekeler and his wife, who refused to acknowledge the validity of his claim. He then sought to obtain from Mrs. Krekeler a mortgage upon certain property of hers in Eldridge street, and it is difficult, if not impossible, to determine from the evidence whether he sought that security as an indemnity against those costs and expenses, or whether as a substitute for a second mortgage which he held upon the Eleventh street house.

However that may be, he went to Mrs. Krekeler's rooms, induced her to exhibit to him the deed from himself to Stoddart, and the deed from Stoddart to her, and when he had got them in his hands, placed them in his pocket and instantly fled from the house. The deeds were not on record, and taking advantage of that fact, he conveyed the property to his housekeeper, Metta Heinecke, who conveyed it to the defendant Wessel, and there is no doubt from the evidence and from the course of the defendants in the trial, that the two conveyances last mentioned were voluntary, and made for the sole purpose of placing the property beyond the plaintiff's reach. Thaule's claim in this action amounts to this: that by taking the deeds violently from Mrs. Krekeler, he acquired an equity in the property, which entitles him to hold it until he shall be paid the costs and expenses he had pre-

In the Matter of Page, a Lunatic.

viously incurred in the actions prosecuted or defended in his name. The mere statement of his claim answers it completely. We cannot, therefore, agree with the special term in its conclusion that Thaule was entitled, before he and the other defendants reconveyed the premises to plaintiff, to be allowed such payments, nor with the conclusion that he was entitled to a personal judgment against her for the amount of such payments.

The judgment should be reversed, and a new trial ordered, costs to abide event.

JOSEPH F. DALY, J., concurred.

Judgment reversed, and new trial ordered, with costs to abide event.

IN THE MATTER OF BENJAMIN PAGE, A LUNATIC.

(Decided April 2d, 1877.)

There is no rule of law excluding the heirs or next of kin of a lunatic from being appointed committee of his person and property, although the court will exercise circumspection and care in appointing those who might be benefited by the lunatic's death, and who would have an interest in accumulating the income of his estate.

The court selects the committee with the view of doing what in that particular case is best for the lunatic, keeping in view the possibility of his recovery; and does not recognize any absolute preference of relatives to strangers or of strangers to relatives.

The report of a referee, to whom it has been referred, to inquire and report a proper person or persons to be the committee of a lunatic, should not be confirmed where it appears to the court that the referee has exercised no discretion in his selection between the only two persons proposed, but has reported one for nomination on the erroneous supposition that the other was, as a matter of law, excluded from appointment, but the matter should be referred back to him for the exercise of that discretion.

The opinion *In the Matter of Owens*, 5 Daly, 288, explained; by CHARLES P. DALY, Chief Justice.

In the Matter of Page, a Lunatic.

APPEAL by David C. Page and others, relatives of the lunatic, from an order of this court, made by Judge VAN BRUNT, confirming the report of John M. Scribner, jr., a referee, to whom it was referred, to inquire and report who was a proper person to be appointed a committee of the person and estate of Page, a lunatic.

Testimony was taken before the referee as to the suitability of two persons proposed for the appointment—Stephen H. Olin, a stranger to the lunatic, whose appointment was urged by one of the relatives, and Robert L. Keen, a cousin of the lunatic, whose appointment was urged by all the other relatives who appeared in the proceedings. The referee reported in favor of the appointment of Stephen H. Olin, but by the written opinion accompanying his report, it appeared that his selection had been determined by the fact that he supposed that under the decision of this court *In Matter of Owens* (5 Daly, 288), Mr. Keen was excluded from the appointment because he was a first cousin of the lunatic. The portions of his opinion bearing on that point are as follows: “Having considered the testimony offered, and the authorities submitted by counsel representing the parties severally petitioning for the appointment of Messrs. Olin and Keen respectively, I am of opinion that Mr. Stephen H. Olin is the person who ought to be appointed such committee. No question is raised by counsel as to the integrity, capacity or fitness of either of the gentlemen named, and the only question which arises is as to the rule which should guide the referee in this selection of a committee. I am of course controlled by the decisions of this court, in which the proceeding was instituted for the appointment of a committee of the said lunatic, and in a recent case in this court, at general term, it was held that care has always been taken not to intrust the custody and estate of a lunatic to those who may be pecuniarily benefited by the lunatic's death, whose interest it may be to keep his property from diminishing, whereby the lunatic may be deprived of necessities or comforts which might be secured to him from the income of his own estate. (*Matter of Owens*, 5 Daly, 293.) This being one of the designated tribunals to

In the Matter of Page, a Lunatic.

which has been committed by statute the care and custody of the person and estate of a lunatic or person of unsound mind, residing in the city of New York (Code, section 30, Laws of 1854, chapter 198, section 6; Constitution, article 6, section 12), it has the same jurisdiction as was formerly confided to the Court of Chancery, without any restriction or limitation, and the manner in which the control thus given is to be exercised is entirely a matter of discretion with the court. (*Matter of Mason*, 1 Barb. 441.) The governing principle on which the court acts in the appointment of a committee, and in the management of the estate of a lunatic, is the interest of the lunatic himself, and not that of those who may have the right of succession. (*Matter of Salisbury*, 3 Johns. Ch. 347; *Matter of Colah*, 3 Daly, 529; where Chief Justice Daly in an interesting opinion refers to many authorities on this subject.) I have not overlooked the cases cited by the counsel for the parties requesting the appointment of Mr. Keen, but those authorities, or nearly all of them, were before the court in the *Matter of Owens* above referred to, and in my opinion, the rule laid down by the court in that case is the one which must govern the referee in the selection of the committee in the present proceeding. Mr. Keen is first cousin of the lunatic, and under the principle of that decision is excluded from appointment as committee. Mr. Olin is not a relation, and would not be entitled to succeed to his estate as heir-at-law, or next of kin."

Judge VAN BRUNT, on confirming the referee's report, made the following memorandum:—"Under the decision in the case of *Matter of Owens* (5 Daly, 288), I am compelled to confirm this report; but I cannot do so without expressing my dissent from the doctrine enunciated in that case, that next of kin are excluded from appointment as committees of the person or estate of lunatics. I do not think the authorities will support such a doctrine."

Michael H. Cardozo, for the appellant.—A *relative* is always preferred as the committee of the estate and person of a lunatic rather than a *stranger*. (*Matter of Livingston*, 1 Johns. Ch.

 In the Matter of Page, a Lunatic.

436; *Lamoree's Case* [1860], 11 Abb. Pr. 274; *In the Matter of Taylor* [1842], 9 Paige, 611; Crary's Spec. Pro., vol. 2, ch. XVIII, p. 15, 2d ed.; Barbour's Chancery Practice, vol. 2, p. 236, Book V, ch. 6, 2d ed.; Wait's Practice, vol. 6, p. 426; Hoffman's Chancery Practice [1839], 1st ed., vol. 2, pp. 258, 260; 1 Bouv. Law Dic., p. 297.)

Our law in relation to persons of unsound mind comes from England, and the principles there determined, the rules there established, in the absence of legislation should govern here. The authorities in the courts of that country unite in giving the preference to a relative. (Elmer on Practice in Lunacy, 5th ed. [1872], p. 25; Phillipps on Lunacy, p. 281; Shelford on Lunacy, p. 131; 2 Law Lib. p. 83; Bacon's Abridg. Bouvier's ed., vol. 5, page 12, where it is said: "In the appointment of committees, relations, unless there is some specific objection, are preferred to strangers. It is no objection in modern practice, though it was so formerly, that the committee of the person is entitled, as heir-at-law, upon the death of the lunatic, to his real estate. That he is the next of kin to the lunatic, and may come in for a share of the personal property under the statute of distributions, has never been considered as an objection." Stock on Non Compos Mentis, p. 121, et seq.; 9 Law Lib. [N.S.] II., page 71; 1 Fonblanque's Eq. 53 [note o]; Petersdorff's Abm., 2d ed., vol. 5, p. 409 [1], where it is said that "relations are in general appointed in preference to strangers, unless some specific objection be urged;" *Dormer's Case* [1724], 2 P. Wm. 263, here the uncle of the lunatic was appointed committee; *Ex parte Ludlow* [1731], id. 635; *Ex parte Lyne* [1735], Cas. Temp. Talb. 142, the next of kin was, together with her husband, appointed committee of the lunatic's estate; *Ex parte Grimstone* [1772], Amb. 706, the heirs-at-law of the lunatic were entrusted with the custody of his estate; *Ex parte Cockayne* [1802], 7 Ves. 591 and note, the lunatic's brother of the half blood was made committee of his estate and person; *Ex parte Le Heup* [1811], 18 Ves. 221, where an uncle of the lunatic was made committee; *Ex parte Pickard* [1814], 3 Ves. & Bea. 127, here the lunatic's sister

 In the Matter of Page, a Lunatic.

was one of the committee; *In re Lord Bangor* [1818], 2 Molloy [Ir. Ch.], 518; *Ex parte Farrow, In re Adams* [1829], 1 Russ & Mylne, 112, in this case the Lord Chancellor granted the application of the sister of a lunatic and her husband to be appointed committee of the person and estate of the lunatic; *In the Matter of the Earl of Lanesborough* [1826], Lloyd & Goold Temp. Plunk. 503, here the heir-at-law of the lunatic was made committee of his estate; *In re Hussey* [1828], 1 Molloy, 226; *In re Persse* [1828,] 1 Molloy, 439; *In re Blair* [1836], 1 Mylne & Craig, 300; the heir-at-law of the lunatic was committee of her person and estate; *In the Matter of Webb* [1846], 2 Phillips 10, 532; *Re Watkins* [1846], 1 Co., t. Cott. 225; *In re Meux* [1808], 2 id. 106, 107 [n]; *Leaf v. Coles* [1852], 1 DeG., McN. & G. 417, where it appears that a brother of the lunatic was appointed the guardian of his person and receiver of his estate; *Ex parte Mount* [1851], 21 Law Jour. Rep. [N.S.] Chanc. 221, the heir-at-law, who, together with one other person, was also next of kin, was committee of the person of the lunatic; *In re Pugh* [1853], 3 DeG. McN. and G. 416, where the father was made committee of the person and estate of his lunatic son; *In re French* [1868], 37 Law Jour. R. [N.S.], Chanc. 537, the sister of a lunatic and her husband were appointed such committee; *In re Strickland* [1871], L. R., 6 Ch. Ap. 226, the heiress-at-law and next of kin were made such committee; *In re Wynne* [1872], L. R. 7 Ch. Ap. 229, the lunatic's wife was made committee; *In re Scarlett* [1873], 8 id. 739, the committee of the person was the heiress-at-law and sole next of kin of the lunatic, and the committee of the estate was their son.)

G. L. Rives, for respondent.

CHARLES P. DALY, Chief Justice.—Where an unobjectionable person has been appointed by the referee, it is not the practice of the court to disturb the appointment, upon the ground that a relative ought to have been selected, or the converse, or that a better selection from among the persons named might have been made. The selection of the com-

In the Matter of Page, a Lunatic.

mittee by the referee is a matter of judicial discretion, with which the court should not interfere, unless he has selected an improper person or one who is disqualified, or one whose situation is such as to warrant the belief that the interests confided to him may not be properly attended to. (*Creuze v. Bishop of London*, 2 Brown's C. C. 253; *Thomas v. Dawkins*, 3 id. 508; id. 1 Ves. jr. 452; *In the Matter of The Eagle Iron Works*, 8 Paige, 386.) These were cases of the appointment of a receiver, but the rule is the same in respect to the appointment of a committee of a lunatic. (*Lady Mary Cope's Case*, 1 Eq. Ca. Ab. 277 s. d. 3; s. c. 2 Ch. Cas. 239; *In re Lord Bangor*, 2 Molloy, 519.)

If the referee had, in the exercise of his discretion, selected Mr. Olin instead of Mr. Keen, there would be no ground for interfering; but it is evident from the referee's opinion, that he exercised no discretion as respect to Mr. Keen; that, being a first cousin of the lunatic, he regarded him as excluded from appointment as a committee under, as he said, the principle of the decision of this court. (*Matter of Owens*, 2 Daly, 288.) It was certainly not my intention to hold in that case that a relative who may be pecuniarily benefited by the lunatic's death is disqualified from being appointed the committee of his estate, but, in looking at the language I used, I can see that it may have conveyed that impression and misled. I meant to say that the court would exercise circumspection and care in appointing those who might be benefited by the lunatic's death, and whose interest and disposition it might be to lessen his comforts that his estate might be diminished as little as possible; not, however, that they were disqualified; which would have been disregarding a long line of cases in which relatives have been appointed from *Justice Dormer's Case* (2 P. Wm. 263) down to the present day. The rule is not that the relatives are to be preferred to strangers, nor strangers to relatives, but that the court in the particular case is to do that which is best for the lunatic, keeping in view the possibility of his recovery. "It is his benefit and comfort I am to take care of," said Lord Macclesfield, in *Justice Dormer's Case*, "and not to heap up wealth for the

Lake v. The Devos Manufacturing Co.

benefit of his administrators, or next of kin." Where the custody of the person and estate is to be united in the same committee, a relative may take much more interest in looking after the lunatic's welfare and comfort, and feel more sympathy for him than a stranger would do. But whether a relative or a stranger is to be preferred should be determined in the particular case, in view of all the circumstances, and not by the application of any general rule, for there is none, except that heirs or next of kin are not disqualified, if the court or its officer, in the exercise of a sound judicial discretion, think proper to appoint one.

Mr. Olin is a gentleman known to the court, and one in every way qualified for the discharge of such a trust, and I feel very reluctant to interfere with his appointment. It is, however, said in the referee's opinion, that no question was raised at the hearing as to the integrity, capacity, or fitness of either of the gentlemen named; and, as a large number of the relatives desired the appointment of Mr. Keen, it may be, for all that we know, that the referee, in the exercise of his discretion, would have appointed him, had he not considered him disqualified under the construction which the referee gave to our decision in the *Matter of Owens*. I think, therefore, that it will be better to refer the matter again to the referee, that he may be at liberty to select Mr. Keen, if, in the exercise of his discretion, he thinks it more judicious to do so.

VAN HOESEN, J., concurred.

Ordered accordingly.

GEORGE W. LAKE, Respondent, *against* THE DEVOS
MANUFACTURING COMPANY, Appellant.

(Decided April 2d, 1877.)

Where the plaintiff had exported certain goods which he had purchased from the defendant, viz., oil in cans, and the defendant had acted as agent for the plaintiff in shipping it, and had shipped it and entered it at the Custom House for

VOL. VII.—11

Lake v. The Devoe Manufacturing Co.

the drawbacks allowed on the cans, under U. S. Rev. Stat., § 3015, *et seq.*, in the name of the defendant, and in that name received the debentures given under the treasury regulations for the drawback. *Held*, that the plaintiff being the exporter was entitled to the drawback under the statute and the treasury regulations made thereunder, and could treat the defendant as his agent in entering the goods for the drawback and receiving the debentures therefor, and collecting the money thereon, and could maintain an action against the defendant for the money so collected.

Held, further, that by making delivery to the defendant of the certificate issued under the treasury regulations by the collector of the port from which the goods were exported to the "exporter or his agent," showing the right to the drawback (and by which the defendant secured the issuing to it of the debentures, and the cancelation of the bond given by it under U. S. Rev. Stat., § 3042, on such entry of the goods for exportation), and by bringing a suit against the defendant to recover from it the money received by it on the debentures, the plaintiff ratified all the acts of the defendant in entering the goods, and could not claim the drawback from the government, and that this case was therefore distinguishable from *Butterworth v. Gould* (41 N. Y. 460) and *Patrick v. Metcalf* (37 N. Y. 332).

APPEAL by the defendant from a judgment rendered by the Justice of the District Court of the First District in New York City, in favor of plaintiff for \$44 50 and costs, being the amount of certain drawback received by defendant on the exportation from the port of New York to Japan of tin cans (containing oil), the cans being manufactured in this country of materials imported therein on which duty had been paid. The drawback was that allowed by Rev. Stat. U. S. § 3015, *et seq.*, and pursuant to the Treasury Regulations, Art. 819, 825-6-7-8 and 831.

Scudder & Carter, for appellant.

Charles Harris Phelps, for respondent.

JOSEPH F. DALY, J.—The plaintiff was exporter of the cans and oil, the defendants, from whom he purchased it, acting as his agents in shipping it, although they did so in their own name and entered the goods for drawback in their own name. Under the Statutes of the United States, the drawback debentures are to be issued at the request of the exporter (U. S. Rev. Stat. § 3038), and by the Treasury Regu-

Lake v. The Devoe Manufacturing Co.

lations the exporter alone is recognized as the party to apply for and receive the debentures. Plaintiff, the exporter of these oil cans, may treat the defendants as his agents, and to that extent ratify their act in entering the goods for drawback and receiving the debentures, and may maintain his action for the money so received by them, because:—1st. Defendants in shipping the goods acted as plaintiff's agents, pursuant to his directions, and were thus, and not otherwise, enabled to make the export entry for drawback in the course of his employment and not independently of him. 2d. Defendants canceled their bond given on such entry by the certificate given them by plaintiff, who, at the time he gave it, demanded the drawback. Upon the conflicting testimony on this point we must assume from the decision the justice found in plaintiff's favor. 3d. By this action and the delivery of such certificate, plaintiff ratifies all the acts of defendant in entering the goods, and cannot claim against the government. The authorities cited by defendant (*Butterworth v. Gould*, 41 N. Y. 450; *Patrick v. Metcalf*, 37 N. Y. 332), therefore, do not apply to the state of facts here disclosed.

But defendants claim that by the custom of the trade, they, as sellers of the oil in cans to plaintiff for exportation, were entitled to the drawback, having made the customary deduction from the price for the oil they sold plaintiff in consideration of such drawback to be received. But the plaintiff, admitted as a witness as to the custom, testified that where the seller is to retain the drawback a special contract is always made.

The evidence is conflicting, but the justice has found against defendants on the questions of fact in the case, and I am not in favor of disturbing his decision.

The judgment should be affirmed.

CHARLES P. DALY, Ch. J., concurred.

VAN HOESSEN, J.—I think *Butterworth v. Gould* (41 N. Y. 450) an authority in favor of the plaintiff. I concur in Judge Daly's views.

Judgment affirmed.

Grunhut v. Rosenstein.

BERNHARD GRUNHUT, Respondent, against LEO ROSENSTEIN, Appellant.

(Decided April 2d, 1877.)

Where the defendant had sent his wife and children to live with the plaintiff, and had then demanded the children from his wife, who had (to the plaintiff's knowledge) refused to deliver them up, and the defendant had thereafter sued out a writ of *habeas corpus* for his children, and in those proceedings his attorneys had agreed that until the termination of the proceedings the children should remain in the custody of the wife. *Held*, that although the refusal to surrender the children to the defendant would otherwise have prevented his liability for necessities supplied to them thereafter, yet his subsequent consent that they should remain in the custody of the mother until the termination of the *habeas corpus* proceedings continued his liability therefor to the plaintiff for necessities furnished them while in the custody of their mother until such proceedings were terminated.

Where the defendant's children, who were living with their mother (the defendant's wife), from whom he had separated himself, were of the ages of twelve, nine, and eight years, and were in ordinary health and attended school daily, and the defendant's wife was able to take care of them, had she chosen to do so, and the defendant was a man of small means. *Held*, that under these circumstances, a nurse for the children was not necessary, and that the plaintiff who had paid the wages of such a nurse could not recover the same from the defendant.

APPEAL by the defendant from a judgment of the Third District Court in New York City.

The action was brought by the plaintiff to recover from the defendant the sum of \$100 for necessities alleged to have been furnished by the plaintiff to, and at the request of, the wife of the defendant, of which \$22 was for medical attendance and \$78 for wages of a nurse.

The answer was a general denial.

The evidence in the case, as shown by the return of the justices, was that the plaintiff was the brother of Mrs. Matilda Rosenstein, the wife of the defendant; that on September 14th, 1875, the day Mrs. Matilda Rosenstein arrived from Europe, the defendant made a communication to her in writing, in which he informed her that on account of infor-

Grunhut v. Rosenstein.

mation he had received, that while residing in Germany she had been unfaithful to him, he refused to further live with her or recognize her as his wife until he was satisfied of the falsity of the charges; that he had determined not to separate himself from her except upon proof that she was guilty, and that for the purpose of obtaining definite information he had sent to Germany, and that until an answer to his letter was received he should continue to furnish her with such means for her support as he could afford, and that he desired her to go to the house of her father or brother, and reside with them until he was satisfied of her innocence of the charges made against her, or until her guilt was established.

That at this time she had with her the three children of the defendant and herself, aged respectively twelve, nine, and eight years; that on that or the following day she, accompanied by the three children, went to the house of plaintiff, where she remained until some time in April or May, 1876; that the defendant, having been advised that he was entitled to the care, custody, and control of his children, made arrangements to have them boarded and educated at a boarding-school in this city, and on or about the 16th of September, 1875, he notified his wife that he had made such arrangements, and that he should call at the house of the plaintiff on the 17th of September for the purpose of taking said children to school; that he called accordingly on said day and demanded the children, whereon she refused to give them up, and of these facts the plaintiff had notice.

That thereupon the defendant procured a writ of *habeas corpus* from the Supreme Court to obtain the custody of his children, and that the proceedings on the return of the writ having been adjourned the attorneys for the defendant signed a stipulation that until the termination of the *habeas corpus* proceedings, or until a demand should be made for their production, the children should remain in the custody of their mother, and that under this stipulation the children had remained in the custody of their mother until after the commencement of this action.

Grunhut v. Rosenstein.

Samuel Boardman, for appellant.

VAN HOESSEN, J.—If the defendant had not, subsequently to the time he demanded of his wife and the plaintiff the possession of the children, consented that the *status in quo* should be preserved during the *habeas corpus* proceedings, I should have no hesitation in saying that the plaintiff could not maintain this action; but, by consenting to preserve the *status in quo*, he agreed to continue the arrangement under which his wife and children were boarding and lodging with the plaintiff, and until the *habeas corpus* proceedings are terminated in some way, he will be liable to pay for necessaries for the children whilst in the custody of the mother. (*Gill v. Read*, 5 R. I. 343.)

A husband is not liable for money lent to his wife, unless his request be averred and shown (2 Kent, marg. p. 146, citing 7 Taunton, 432). In this case it appears that the payment of servants' wages by the plaintiff was nothing more than a loan of money or an advance to the wife. Furthermore, the evidence shows that a nurse was not necessary for the wife of the defendant or for the children. The children were twelve, nine, and eight years old; they went to school, were very regular in their attendance, and were in ordinary health; neither of them required a nurse, nor was a nurse employed in consequence of the bodily infirmities of the children; Mrs. Rosenstein was well able to take care of them, and the only excuse offered for the employment of a nurse is that Mrs. Rosenstein was frequently away from home of afternoons, looking after her lawsuit with her husband. During school hours the children were at school; and the plaintiff's claim is, I suppose, that a nurse was needed to receive the children on their return from school when the mother chose to be away from home. The nurse did not sleep on the same floor with the children, never knew they were ailing, and is not shown to have had any duties to perform with respect to them; what work she did whilst the children were at school is not shown, though from the fact that the plaintiff employed her, I think it not unfair to

Grunhut v. Rosenstein.

conclude that she was doing domestic service about the house. It would be doing no violence to the testimony to infer that the presence of Mrs. Rosenstein and her children in his house made it necessary for the plaintiff to employ an extra servant, who was styled the nurse, in order that the defendant might be called on to pay her wages. The defendant is a man of little or no means. There is a good deal of evidence in the case respecting a multitude of bills against the defendant which the plaintiff has presented. It seems that though the children were all the time well enough to go to school, the plaintiff has charged more than one hundred dollars per month for medical attendance upon them; not satisfied with this, a Dr. Elliot, who occupies the office with him, has also a bill for medical attendance. The plaintiff has presented other bills, making an average of nearly six hundred dollars per month, for board, lodging and medical attendance furnished Mrs. Rosenstein and the children. A husband and father is bound to furnish necessities to his wife and children, but it is for the court to say what are and what are not necessities. Under the circumstances of this case, I am satisfied that a nurse was not necessary. I waive observations respecting the *bona fides* of the plaintiff in his claims against the defendant.

The judgment should be modified by deducting \$78, the amount of plaintiff's advances for nurse's wages, and, as modified, should be affirmed without costs of appeal.

CHARLES P. DALY, Ch. J., concurred; JOSEPH F. DALY, J., dissented.

Judgment modified in accordance with opinion, and, as modified, affirmed.

Durian v. The Central Verein of the Hermann's Söhne.

**BARBARA DURIAN, Appellant, *against* THE CENTRAL
VEREIN OF THE HERMANN'S SÖHNNE, Respondent.**

(Decided April 2d, 1877.)

Where a benevolent association, organized under the general act for the incorporation of benevolent societies, provides by its constitution that upon the death of a member of the society each member thereof shall pay into the treasury of the society \$1, and that the sum thus realized shall be paid to the widow or minor children of the deceased member, the rights acquired by a person who becomes a member of the society while such a constitution is in force does not constitute a contract of insurance upon his life by the society, and in favor of the then wife of the member, under the statutes (L. 1840, c. 80 ; L. 1858, c. 187) empowering a wife to insure the life of her husband, and the constitution of the society may afterwards be changed so as to make the sum payable to any one designated by the member in his lifetime, and the person so designated will then be entitled to the exclusion of the widow.

A provision of the constitution of such a society requiring a member to designate the beneficiary whom he designs to have share in the benevolent fund at his death is sufficiently complied with by any form of words that is sufficient to clearly make known his intention, and the addition of the word "wife" to the name of the person designated, she not being his wife, does not make the designation ineffectual.

APPEAL from a judgment entered upon a decision of the general term of the Marine Court of the city of New York, affirming a judgment rendered by that court at trial term in favor of the defendant upon the merits. The cause was tried by the court, a jury having been waived.

This action was brought by the plaintiff, Barbara Durian, to recover from the defendant, an incorporated benevolent society, the sum of \$500, to which she claimed she was entitled out of its funds, as the person who had been designated in accordance with its constitution to receive said sum, by Philip Durian, a member of that society, who had died after making such designation.

The defense substantially was that by the constitutions of that society the sum of \$500 was payable to the widow of

Dorian v. The Central Verein of the Hermann's Sohne.

the deceased member in preference to the person designated ; that Barbara Durian was not the widow of Philip, but that one Catherine Durian was, and further, that Barbara was never designated by the deceased member in accordance with the constitutions of the society. The provisions of these constitutions bearing upon the points in controversy will be found in the opinion.

Henry Wehle, for appellants.

Roscoe H. Channing, for respondent.

VAN HOESSEN, J.—The Central Verein of Hermann's Sons is a benevolent association which was formed in the year 1867 under the general act for the incorporation of such societies. It is a sort of mutual life insurance society, only those who belong to the order called the Sons of Hermann being eligible to membership in the Central Verein. One Philip Durian became a member of the Central Verein in the year 1867, soon after its formation. At the time Durian joined the association he was living with his wife Catherine, who is now his widow. About two years afterwards Catherine went to Europe, and during her absence Philip begun living with the plaintiff in this action, who adopted his name, and passed as his lawful wife until the time of his death. After Catherine returned from Europe, she probably married a man called Roth. Philip Durian died in the year 1875. For some time prior to his death, the plaintiff paid with her own money Philip's dues to the Verein.

At the time Philip became a member of the Verein, the constitution provided as follows : " At the death of a brother of this Central Society, every member must pay one dollar, and the amount is to be paid over in three months to the widow, or the minor children, or *in their absence* to such person or persons as he may have indicated to the Central Society in writing before his death." For the purpose of defeating the plaintiff's claim in this action, the defendant contends that that article of the constitution is in

Durian v The Central Verein of the Hermann's Söhne.

effect a policy of insurance; that the wife Catherine is the actual beneficiary referred to in the policy, though her name was not mentioned, and her existence may not have been known; that her right to the money, coming by virtue of the policy from the society upon the death of Philip, could not be affected by any assignment or appropriation Philip may have attempted to make without her consent; that Philip had no power to designate any other person to receive the insurance except in case of her absence (death); and that the Verein could not, by any change of its constitution, destroy or impair her vested right to the benefits of the policy.

It will be seen that the argument of the defendant denies the right of the Verein to make any changes in its constitution, or to pass any by-laws, or to impose any conditions or restrictions whatsoever, even with the consent of a member, which shall affect the claims of the wife of that member. It is contended, in other words, that the moment a new member was admitted into the Verein under the constitution of 1867, the right of his wife to the money payable at his death became fixed and vested, and, except in case of forfeiture, the Verein and the husband, together or separately, could make no change in the constitution or in their agreement that would cut the wife off. Although that is the position taken by the defendant on the argument of this appeal, the Verein has repeatedly changed its constitution, and prescribed many conditions upon existing members, some as safeguards against fraud, and some to enlarge the power of members to dispose of insurance money payable. Thus, in 1870, the constitution was amended so as to provide, that "In case of the death of a brother, the society assumes the obligation to pay the round sum of \$500 to those he leaves behind (widow, children, or such other person as he shall designate, more particularly before his death), within thirty days after his decease." It will be seen that the amendment dispenses with the requirement that the designation shall be in writing, and that it omits the provision that other persons can be designated to receive the money *only in the absence of a widow or children*. In 1872, the constitution was again

Darian v. The Central Verein of the Hermann's Soehne.

amended so as to provide that the Verein should, in case of the death of a member, pay the widow, children or other person whom he may designate for that purpose before his death, the sum of \$500 "in thirty days from the reading of the certificate of death in the first monthly meeting." The constitution was again amended in 1874, but there was no substantial change in the article above quoted.

In 1874 an article was added to the constitution which requires that "the names of the wives of the members shall be registered," and provides that "no payment shall be made to any person whose name is not entered on the register as prescribed."

Philip Durian, in compliance with that article of the constitution, directed the name of the plaintiff to be registered as that of his wife, and her name was accordingly so entered upon the register.

It may be observed in passing, that according to the argument urged by the defendant, the article of the constitution providing for the registry of the names of wives, and making such registry a condition of paying the insurance money, was null and void as against the wives of all members who had joined the Verein before the article was adopted. It would follow therefrom that the fact of the non-appearance of the name of Catherine Durian on the registry did not impair her right to the money, and that the defendant, upon its own showing, had no valid excuse for refusing to pay her.

The statutes of New York, as well as the statutes of almost every State in the Union, have made provision for saving to the wife and children of a party the amount for which his life shall be insured. They protect the family of the insured against his creditors, and his wife against herself. (*Eadie v. Slimmon*, 26 N. Y. 9; *Barry v. Equitable Life Assurance Soc.* 59 N. Y. 587.) Under the legislation of most of the States, a husband, after taking out a policy for the benefit of his wife and children, can not assign it, or dispose of it by will. It was said in *Gould v. Emerson* (99 Mass. 154) that even without any legislation, it was possible that, by the general principles of equity jurisprudence, a policy on the

Durian v. The Central Verein of the Hermann's Sohne.

life of a husband, for the benefit of his wife and children, would constitute an executed voluntary settlement, which he could not revoke by a subsequent like settlement, or by will, and which could be enforced against his representatives. This was an *obiter dictum*, and need not be considered here. It cannot be pretended that there was ever any settlement of the sum of \$500 upon Catherine; for the constitution of 1867 provided only for the payment of \$1 by each member to the widow of a deceased brother. I think it may be assumed without argument that the proceedings of a benevolent society like the Sons of Hermann and its Central Verein are not subject to the operation of the New York statutes (Laws of 1840, c. 80, and L. 1858, c. 187), which empower a wife to cause the life of her husband to be insured. In this case, it is very certain that Mrs. Catherine Durian did not procure the insurance upon Philip's life, and the whole scheme of the organization is inconsistent with the notion of a stranger entering into a contract with the Verein for the insurance of the life of a third person.

I doubt if the counsel for the defendant would contend that the Central Verein was subject to the control of the superintendent of the Department of Insurance, and obliged to conform to the laws respecting life insurance companies. The Verein is a corporation, but it is not restricted by law as to the methods of accomplishing the benevolent designs to promote which it was organized. It issues no policies. Is it true, as the defendant contends, that the constitution for the time being is a policy, and that a member, who by joining the society accepts that constitution, cannot consent to change it, because he would, in fact, be varying the terms of a policy to which another had the sole and indefeasible title? Such certainly has not been the understanding of Hermann's Sons. Those who have joined the Verein since 1870 have been at liberty to select others than members of their own families as appointees to receive the insurance money, and the association has repeatedly re-adopted the provision of the constitution which confers that power. It cannot, therefore, be, as the learned judge at special term below supposed,

Durian v. The Central Verein of the Hermann's Soehne.

that "the whole character of the foundation of the Verein forbids the appointment of a stranger as the beneficiary." It is conceded by the counsel for the defendant that such an appointment may be made. The case seems to me to be simply this:—The title of Catherine Durian is not protected by the statutes of the State. If she be entitled to the insurance money, it must be because of a contract made between Philip Durian and the defendant, which it was out of their power afterwards to vary, because she had an interest in it which it would be unjust and unlawful to impair. What interest had Catherine in it? Why could it not be modified by the parties who made it? The counsel for the defendant has not shown. Conceding that Philip intended, at first, that she should receive the insurance money, he had a right to change the direction in which the money should go at any time before he had actually placed in her hands, or beyond his own control, the means of enforcing her claim to the money. (*Lemon v. Phoenix Life Insurance Company*, 38 Conn. 301.) It was competent, in my opinion, for Philip and the Verein to modify their agreement in any manner satisfactory to both parties. It was competent for Philip, with the consent of the Verein, to name a beneficiary other than his wife, even though his wife were present. The amended constitution, to which he assented, formed a new contract between him and the Verein, under the terms of which he was at liberty to choose whom he pleased as appointee. He named Barbara, the plaintiff. It is objected that he falsely alleged her to be his wife, and that, though he named her as his wife, he did not designate her as the beneficiary. There was no set form of words which he was bound to employ. All that he was required to do was to select the person whom he wished to receive the money on his death, and communicate her name, that it might be entered on the registry. There can be no doubt as to his intent, and that that intent was effectuated. That the plaintiff was called wife by him ought not to be permitted to defeat her claim. The intent is to be regarded, and that intent is plain. It has been held that "a woman who was married to a man, but illegally, because he

Ninth Ave. Railroad Co. v. New York Elevated Railroad Co.

had a former wife living," could recover in an action upon a policy of insurance in her favor. (*Equitable Life Assurance Society v. Paterson*, 41 Ga. 338.) The observations made by the Supreme Court of Georgia in that case seem to me to be entirely pertinent to the case at bar. (See note 2 to sec. 25, Bliss on Life Insurance.) The order and the judgment appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

CHARLES P. DALY, Ch. J., and JOSEPH F. DALY, J., concurred.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event.

THE NINTH AVENUE RAILROAD COMPANY, Appellant,
against THE NEW YORK ELEVATED RAILROAD COM-
PANY, Respondent.

[Decided April 2d, 1877.]

An injunction against the maintenance of a structure which is a common nuisance, will not be granted at the suit of a party not suffering or in danger of suffering any injury other or greater than all other persons suffer and are likely to suffer from the same nuisance.

Nor for an injury arising from negligence not the ordinary and necessary result of the use of the road.

Nor even if the private party asking for the injunction shows that he has suffered, or is in danger of suffering an injury, other and greater than the rest of the community, will an injunction be granted unless it appears that the injury existing or threatened is of a serious or irreparable character, and there has been diligence in applying.

APPEAL by the plaintiff from a judgment of this court,

Ninth Ave. Railroad Co. v. New York Elevated Railroad Co.

entered on a decision made at special term, Judge VAN HOESSEN, dismissing the complaint.

This action was brought by the plaintiff, the Ninth Avenue Railroad Company, a corporation operating a horse railroad in the city of New York, against the defendant, a corporation operating by steam an elevated railroad in the same city, and a part of its distance above the plaintiff's road on the same avenue. The relief demanded was an injunction against the maintenance of the elevated road above Thirtieth street, against the use of steam locomotive engines at any point on the elevated road, and against the further erection, or the use of any part of its structure in the carriage way, or that part of the street used by vehicles.

The facts as found by the court at special term will be found stated in the prevailing opinion.

F. N. Bangs and J. M. Scribner, Jr., for appellant.

James Emott, A. J. Vanderpoel and E. C. Delavan, for respondents.

CHARLES P. DALY, Chief Justice.—It must be regarded as settled by the decision of the general term, in the action brought by Patten against the defendants, at least so far as this court is concerned, that the defendants had no authority by law to erect any structure for the extension of their road along the Ninth avenue, north of Thirtieth street; that the authority given by the 10th sec. of the Act of 1867, to extend the road along Ninth avenue to the Harlem River was an authority to do so within five years, and, although at the expiration of the five years, they may have had the right to the use of that which they had constructed until their franchise was forfeited, they had no authority, after the expiration of that time, to continue the construction of the road further; all authority to do so having ceased, as the time limited for its completion by the Act of 1867 had expired, and no authority was acquired under the Act of 1875, the Legislature, under the amended constitution which was then

Ninth Ave. Railroad Co. v. New York Elevated Railroad Co.

in force, having no authority to pass a private or local bill, granting to any corporation, association, or individual, the right to lay down railroad tracks, or any exclusive privilege, immunity, or franchise whatever; and because that act provided for extending the road over streets and places specified and permitted in former acts, and in the *mode, manner and form* prescribed in such acts, without inserting these acts, or the parts of them that were thus made applicable. (Amended Constitution of 1875, art. 3, secs. 17 and 18.)

It was urged upon the argument that the decision of the general term in this respect, in the Patten case, was erroneous; that the provision in the Act of 1875, extending the time for the building of the road was not the grant of any new franchise, or of any new right to lay down railroad tracks, but a waiver on the part of the State of the forfeiture, which the legislature might do without violating the provisions of the amended constitution referred to. But whether that decision was right or wrong, it is *res adjudicata* in this court, and must be adhered to under the rule of *stare decisis*; leaving the error, if it be one, to be corrected by the court of last resort.

But although the structure north of Thirtieth street must, under this decision, be regarded as a common nuisance, being without authority of law, it does not follow that the plaintiffs—the Ninth Avenue Railroad—are entitled to an injunction against the maintenance of it, unless it appears that they have sustained, or will sustain, some peculiar and special injury greater in degree or different in kind from that of the public generally. If they have not, or will not, they have no right of action, because it is a nuisance; but it is for the attorney general to bring the proper action to abate it in behalf of the people. (*Smith v. The City of Boston*, 61 Mass. 254; *O'Brien v. The Norwich, &c. R. R. Co.* 17 Conn. 372; *Irwin v. Dixion*, 9 How. U. S. 10.) The plaintiffs can maintain no action except upon the ground that they have or will sustain an injury greater or different from that of the community in general; nor even then are they entitled to the kind of equitable relief which is sought in this action unless

the injury is of a serious or irreparable character, and there has been diligence on their part in applying for it.

There was no dispute on the argument that this is the law, and in fact, very little disagreement between the counsel as to the rules and principles which must govern in the decision of this case, as they are well settled.

The plaintiffs acquired by their charter the right to lay down rails along the line of their track in the Ninth avenue; to run cars over the track for the carriage of passengers for hire, and a paramount right to the use of the rails when required for the running of their cars.

The plaintiffs say that up to the time of the adoption of the constitutional amendments of 1875, they were the sole owners of this franchise, and that the effect of those constitutional amendments was to make them, not only the sole owners of the franchise, but to give them for that purpose the exclusive right to the use of the particular streets in which they were operating their railroad for the purpose designated in the grant made to them by the State, and they sought to have the defendants enjoined from continuing their structure and operating their elevated road north of Thirtieth street, as they had no authority in law to do so, and the plaintiffs were peculiarly and specially injured in the use of their road and in the discharge of their duties to the public by the construction and operation of the elevated road of the defendants.

The plaintiffs, by their charter, had no exclusive right to the use of the avenue for the running of a street railroad. A grant of such a franchise, to the exclusion of all others, must be especially made in terms by the Legislature and cannot be taken by implication. (*Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44.)

The plaintiffs' franchise did not, by its terms, exclude the Legislature from granting to the defendants a right to construct an elevated railroad along the same avenue, although it might greatly impair or destroy the value of the franchise previously granted to the plaintiffs. (*The Charles River Bridge v. The Warren Bridge*, 11 Peters, 420; *The Auburn*, Vol. V. 11.—12)

f.c. Road Co. v. Douglass, 9 N. Y. 451, 452, 453.) And whatever may be the effect of the provisions in the constitutional amendments of 1875, in respect to the restraint which they impose upon the powers of the Legislature, it does not follow that the plaintiffs have any other or greater privileges than they acquired by their charter.

The plaintiffs claim that the value of their franchise is greatly impaired by the structure erected by the defendants, and that this is an injury special and peculiar to them that entitles them to have the defendants enjoined from continuing this structure and operating their road over it. The specific injuries which they claim to have sustained are as follows:

1. That the plaintiffs had the use of the avenue on either side of their track in common with the rest of the public. That it was useful and available to enable them to receive and discharge their passengers conveniently; to shift their horses from one car to another; to avoid collision with other vehicles; to turn their horses off the track; to enable other vehicles to get off it easily, when the plaintiffs' superior right to the use of it had to be asserted. That this space has been abridged by the defendants' structure, to the inconvenience and detriment of the plaintiffs, in connecting their railroad. That it impedes access to and egress from their cars. That there is less ease and facility in keeping the track clear of other vehicles, and a greater tendency to crowd the track with other vehicles.

2. That the columns on which the structure stands interferes with the performance of the duty which they are required by their charter to discharge, of keeping the space of two feet on each side of their track at all times in thorough repair.

3. That the projection of the upper part of the defendants' structure, which projects for about one foot and two inches over the roof of their cars as they pass, interferes with the summary mode resorted to by them in winter for removing the snow and ice from their track.

4. That the dripping of water and oil from this upper structure damages the roof of their cars.

5. That the existence of the defendants' structure, and the use of steam-dummies upon it, frightens the plaintiffs' horses, and thus impairs the value of their property.

And lastly, that the effect of this elevated road, which, beyond Thirtieth street, is unauthorized by law, is to divert passengers from their road, who, but for the inducements held out by the elevated railroad, would travel in the plaintiffs' cars.

The judge who tried the cause below has found against the plaintiffs upon all these points; and I think his finding is fully sustained by the evidence.

It justifies the conclusion that the occupation of the space between the defendants' track and the curbstone by the columns on which the defendants' structure rests, subjects the plaintiffs to no other or greater inconvenience than is sustained by the public in general in the use of this part of the street. That in this respect no injury arises from this cause which is special or peculiar to them.

It is shown by the evidence that, notwithstanding these columns or posts, the plaintiffs' facilities for receiving and discharging passengers are as great as they were before these posts were erected, with the simple exception, that it would not be as easy to get off at the point of actual contact with the posts; that the number of convenient stopping places is not at all reduced, as the stopping places are at the crossings of the streets, and the posts are not at the crossings.

All that appears in respect to the removal of ice and snow in winter, is that the plaintiffs cannot use snow-ploughs with the same facility as before. It amounts simply to this: that the snow-ploughs previously used on the Ninth avenue by the plaintiffs, to clear their tracks of snow, cannot be run without being thrown off the track by the columns. It does not follow that the right to use snow-ploughs is a right incident to the plaintiffs' franchise, or that the snow may not be effectually removed from the track by other means, or by snow-ploughs somewhat different in structure, or that those which they have heretofore had in use may not, by some alteration or modification of them, be as effectual as

before. It is not shown that it is indispensable to remedy this temporary inconvenience, that the defendants' structure must be taken down and removed, which would be the effect of their being perpetually enjoined from using it.

It is not shown that the dripping of oil and water on the roof of the plaintiffs' cars is the ordinary or necessary result of the use of the elevated railroad. For all that appears in the evidence, it may have been the result of neglect, or the unskillful use of machinery, or some defect in the construction of it; and at best it was a very slight and trifling grievance. All that was shown on the part of the plaintiffs' was that oil and water sometimes dropped upon and spoiled the canvas upon the roof of the plaintiffs' cars; whilst the effect of the defendants' evidence was that it was not a necessary consequence of the running of their cars, but was rather occasioned by negligence, and the wearing out of the waste used about the journals.

As respects the remedy which is here applied for, to have the defendants' enjoined from any further use of the road on this account, the maxim might be applied, as the defendants' counsel suggests: "*De minimis non curat lex.*" Or if this injury was sufficiently serious to require the interposition of a court of equity by injunction, it would not be to prohibit the running of the cars, but to restrain the use of such materials, or defective machinery, to prevent the canvas with which the roof of the plaintiffs' cars is covered from being soiled.

We are not referred by the plaintiffs' counsel to anything in the testimony, which shows that the plaintiffs cannot keep the two feet of the street on either side of their track in repair as effectually as before, and as the plaintiffs' counsel has not referred us to any such testimony, we may assume that no such evidence was given, without going through the whole of the testimony (which fills a large octavo printed volume), to discover if there be any.

As to the effect of the structure, and of the running of cars over it by steam, upon the plaintiffs' horses, the judge below has given a complete answer. After reviewing the

Ninth Ave. Railroad Co. v. New York Elevated Railroad Co.

evidence upon this point, his conclusion was, that when horses are first driven near to the structure, they exhibit nervousness and alarm, which some never overcome; but that, as a rule, after being a day or two in the neighborhood of the road, they stand without tying under the track as the trains pass overhead, and that at the time when the action was tried, the disturbance to the plaintiffs' horses was so slight as to be almost inappreciable; the whole of which is sustained by the evidence.

It was not shown by the testimony that any passenger who had traveled by the elevated road, would, but for that road, have traveled in the plaintiffs' cars, and paid fare to them; and it was conceded upon the argument, that the plaintiffs' receipts upon their road have not diminished since the elevated railroad has been running. It does not appear, therefore, that the elevated railroad has diverted passengers from them, or, as a competing road, that it has diminished the pecuniary value of their franchises, their receipts not having diminished. This is sufficient to entitle the defendants to an affirmance of the judgment, without considering the additional reason given by the judge below, that it is more than three years since the defendants began the construction of their road; that the plaintiffs' having their own road in the same avenue, necessarily knew what the defendants were doing, and having suffered them, without complaint, to go on, for a considerable time in putting up a continuous and expensive structure, they cannot afterwards apply to a court of equity to have them enjoined from using what they have erected without any objection or complaint being, in the course of the erection, made by the party afterwards claiming that he has or may be injured by it; a just and equitable rule that has been recognized and applied in numerous cases. (*Jones v. Royal Canal Co.* 2 Molloy, 319; *Odlin v. Gove*, 41 N. H. 465; *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515; *Ripon v. Hobart*, 3 My. and Keen, 169; *Binney's case*, 2 Bland Ch. 99; *Southard v. Morris Canal Co.* 1 N. J. Eq. [Sax.] 518; *Hulme v. Shreve*, 4 id. [3 Green] 116.)

People v. Lyons.

Whatever injury has arisen, or may arise, from this unauthorized structure, the plaintiffs share in common with the public. The remedy for it is an action by the attorney general on behalf of the people. They have not shown that they sustain any greater or different injury than may arise to any one in the use of the street. So far as there has been any loss or injury to them, it has either been of a very trivial kind, or such as can be fully repaired by an action for damages. It has not been of a character to justify this court in interposing its equitable power to stop the further running or use of the elevated road, upon the sole ground of the great, peculiar or irreparable injury it will or may do to the plaintiffs' road.

The judgment should be affirmed.

LARREMORE, J., concurred.

JOSEPH F. DALY, J., dissented, holding that so far as the columns immediately adjoining the plaintiffs' tracks were concerned, the decretal injunction should have been granted.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, *on the relation of* THE COMMISSIONERS OF PUBLIC CHARITIES AND CORRECTIONS OF THE CITY OF NEW YORK, Respondent, *against* MICHAEL LYONS AND EDWARD MORRISSEY, Appellants.

(Decided April 2d, 1877.)

Although by the Statute (1 R. S. 643, § 8), a bastardy bond is required to be taken from the putative father "to the people of this State, with good and sufficient sureties," yet if a bond with only one surety is accepted by the magistrate, the

People v. Lyons.

bond is not therefore void under the provisions of 2 R. S. 286, § 59, which provide that "no sheriff or other officer shall take any bond, obligation or security, by color of his office, in any other case or manner than such as are provided by law; and any such bond, obligation or security, taken otherwise than as herein directed, shall be void," and such a bond may be enforced against the principal and surety in it.

The reason and intent of the Statute (2 R. S. 286, § 59) and the class of cases in which it is to be strictly construed, explained. Per CHARLES P. DALY, Ch. J.

APPEAL by the defendants from a judgment of the Third District Court in the city of New York for \$107 50 damages and costs.

The action was against the defendants as principal and surety on a bastardy bond taken in bastardy proceedings before a police justice in New York city.

The defense was that the statute required two sureties on the bond in such proceedings, and that the bond in suit having one surety only was void under 2 R. S. 286, § 59, in regard to bonds taken under color of office as being a bond taken in a manner other than that provided by law.

Thomas Brennan, for appellants.

Wm. O. Boyd, corporation attorney, for the respondent.

CHARLES P. DALY, Chief Justice.—When a statute imposes upon public officers the duty of taking bonds or recognizances, on behalf of the people, in criminal or *quasi* criminal proceedings, and prescribes the form of the bond or recognizance, the number of the sureties, or any other essential requisite, the statute should be substantially complied with. But if something has been omitted in the execution of the bond, it does not lie with the party who has executed it to complain; as these statutory provisions are for the security and benefit of the people. If any condition or obligation which the statute does not require is inserted by the officer taking the bond, that is quite another matter. It is then void, for the Revised Statutes provide that if any officer shall take any bond, obligation or security, by color of his office,

People v. Lyons.

in any other case or manner than such as are provided by law, such bond, obligation or security shall be void (2 R. S. 286, § 59). By color of office is meant some wrongful act, committed by an officer, under the pretended authority of his office (*Decker v. Judson*, 16 N. Y. 442); and where bonds, recognizances or like securities are taken compulsorily by an officer, as in cases of arrest, in bastardy cases, or in criminal or *quasi* criminal proceedings, and some condition or obligation is inserted which the law does not impose, or the condition is different from what the law has provided for, the obligation is void and cannot be enforced (*Hall v. Carter*, 2 Mod. 304; *Rogers v. Reeves*, 1 T. R. 418; *The People v. Meighan*, 1 Hill, 298; *The People v. Mitchell*, 4 Sandf. 466; *The People v. Locke*, 3 id. 443; *Hoogland v. Hudson*, 8 How. Pr. 343), the reason of the common law rule and of the statutory enactment which makes such obligations void, being to prevent oppression or abuse of power on the part of the officer (*Decker v. Judson*, 16 N. Y. 442; *Winter v. Kinney*, 1 Comst. 368). But where such obligations, though taken by an officer, are for the benefit of a party as in replevin or attachment bonds, the instrument is not void, but may be enforced by the party, having been voluntarily entered into (*Franklin v. Pendleton*, 3 Sandf. 572; *Winter v. Kinney*, 1 N. Y. 368, 369; *Fuller v. Prest*, 7 T. R. 110; *Ring v. Gibbs*, 26 Wend. 502). And so, where in an action or proceeding of this nature, the bond is taken for the benefit of the party, and something is omitted which the statute requires, the bond is not void, but merely voidable, at the election of the party affected, who can have the proceeding set aside, unless a proper bond be given. (*Smith v. McFall*, 18 Wend. 523; *Shaw v. Tobias*, 3 N. Y. 188.) But if he is satisfied with it, it does not lie with the parties who voluntarily executed it, to complain. It was held in *Shaw v. Tobias* (3 N. Y. 188) that although the statute requires two sureties in a replevin bond, the party for whose benefit it is taken may waive the objection that there is but one, and that the makers of the bond cannot resist a recovery upon that ground. In *Ring v. Gibbs* (26 Wend. 502) the bond

People v. Lyons.

was taken by the officer to release from seizure property taken under summary proceedings. The Court of Errors held unanimously that it was not a bond taken *colore officii*, as it was not a bond taken by the officer to himself, but was executed to and for the benefit of the party suing out the warrant; that though broader in its terms than the statute required, that did not render it void; that being voluntarily executed by the obligors, they had no right to object to it, having had the full benefit of the proceeding, and could not complain that they had bound themselves to do more than could have been required of them.

In the present case the defendant, Morrissey, who executed the bastardy bond as surety, set up as his defense on the trial, that the bond was void, as the statute provides that the putative father shall enter into a bond to the people with good and sufficient *sureties*; and that, in this case, he being the only one who signed the bond as surety, that it was void, not being executed by *sureties*. As in *Ring v. Gibbs (supra)*, the bond in this case was not taken by the justice to himself, but was taken for the benefit of the people; and if something was omitted which the statute required, I do not see that it lies with the defendant, Morrissey, who executed it, as surety, to complain. If the bond had been prepared to be executed by two sureties whose names were recited in it, and Morrissey, as one of those sureties, executed it, he would, if it had not been executed by the other surety named, have had a right to object, as in such a case he would have the right to infer that it was to be executed also by the other surety named. But no such case is shown here. Neither the bond nor a copy of it has been returned by the justice; all that appears is what is stated in the complaint, that Lyons was convicted of being the father of the child born as a bastard, and that he, as principal, and Morrissey, as surety, executed the bond, from which we cannot infer that Morrissey executed it with the understanding or impression that there was to be a cosurety. So far as the facts admit of any conclusion it must be simply that he executed a bond in which Lyons was named as principal and he was named

People v. Lyons.

as surety, and there is no reason why he should be allowed to evade an obligation thus entered into because the justice did not require another to become cosurety with him.

It is, it is true, a bond given under restraint, but in view of the mischief that was meant to be suppressed, there is a material difference between a bond in which something has been omitted which the statute requires, and one in which something is exacted which the law will not permit. In the latter case the party from whom the bond is exacted has a just right to complain of the wrong that has been done to him; whilst in the other, he has no right to complain that something is omitted, if it can do him no injury. Whilst the rule is to be rigidly enforced which declares such instruments void where they are taken by an officer in cases, or in a manner that the law does not allow, to prevent corruption, the abuse of power or the unlawful exercise of authority, courts are at the same time not to lose sight of the beneficial public objects which the statutes that provide for the taking of these bastardy bonds were designed to effect, and they are to be liberally construed, so as to effectually meet the beneficial end in view and to prevent a failure of the remedy. If something, therefore, is merely omitted in a bastardy bond, I do not see why the People, in whose name and for whose benefit it is taken, may not waive the omission as a party may waive a defect or omission in a bond or security taken for his benefit. If such a party may, as was held in *Ring v. Gibbs*, enforce the obligation, although it is more extensive than the obligors are bound to enter into, I do not see why the public authorities, in whose name and for whose benefit this bond was taken, may not waive the omission of some requirement of the statute, or why the obligor should be allowed to take advantage of such an omission which can in no way affect him, unless he has executed the bond under the supposition that another surety was to execute it with him, either from the recitals in the bond, or from something which occurred at or before the execution of it; and nothing of that kind was shown in this case.

In *McGowan v. Deo* (8 Barb. 340), it was held that the

bond given to a justice of the peace, under the excise law, though not in conformity with the spirit of the statute, was valid; that the bond was not taken *colore officii*, as it was not taken for the personal benefit of the officer, and that it did not therefore come under the class of cases which the statute was meant to suppress. What the statute and the rule of the Common Law especially meant to suppress, were those abuses that arise where ~~sheriffs or~~ other officers ~~take bail bonds or~~ jail liberty bonds, in which case a strict compliance with the law is exacted, as such bonds are given by parties under legal restraint, and the opportunities for abuse is very great, for the parties to such contracts do not stand on equal ground in making them; the party executing the bond being in the power of the officer. In such cases a strict compliance with the statute, if that provides for the kind of bond, or with the law, is necessary to prevent oppression and the abuse of power; but where the bond obligation or security given, does not provide for an indemnity to the officer for a breach of duty, and does not necessarily produce an injury, and is not condemned either by the statute or Common Law, it cannot be regarded as *colore officii*, which usually contemplates an act of corruption in which the office is made use of to give to the act the appearance or *color* of authority (*Shaw v. Tobias*, 3 N. Y. 192; *Decker v. Judson*, 16 id. 442), although an evil or corrupt intent is not essential. It is enough that the act is unauthorized by law and against public policy. (*Richardson v. Crandall*, 48 N. Y. 348, and 37 Barb. 335.) In *Skellinger v. Yendes* (12 Wend. 306), it was held in the case of a constable's bond, which, like the one here, is a bond to the People, that it was no defense to the sureties that it was not in the form prescribed by the statute, and that the town clerk had not, as required by the statute, indorsed his approval upon it.

I think, therefore, that the objection that the bond was void, was not well taken, and that the justice ruled correctly.

It was not necessary that the proceeding should be before two police justices, and that the bond should be approved by them, as was required by the former statute, the statute of

The New York Juvenile Guardian Society v. Roosevelt.

1860 (chap. 508, § 6) having authorized any such proceeding to be taken before one police justice, with the same power, force and effect, as if done theretofore by any two of said justices.

It does not appear from the return that there was any subscribing witness to the bond ; and it further appears that the defendant's counsel admitted the instrument and the signatures to it ; and afterwards sought to limit his admission to a statement that his client signed a paper, but not a bond. It was in the discretion of the court to relieve him from his former admission, but the court did not, and he was consequently bound by it.

The judgment should be affirmed.

JOSEPH F. DALY and VAN HOESEN, JJ., concurred.

Judgment affirmed.

THE NEW YORK JUVENILE GUARDIAN SOCIETY *against*
THEODORE ROOSEVELT *et al.*

[SPECIAL TERM.]

(Decided May 3d, 1877.)

The Constitution of this State having provided in Art. I., Sec. 8, that "every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right ; and no law shall be passed to restrain or abridge the liberty of speech or of the press," a court of equity has not jurisdiction to restrain the publication of libellous matter.

The New York Juvenile Guardian Society, organized under the General Act of April 12th, 1848, for the incorporation of benevolent, charitable and missionary societies—the objects of its incorporation being to provide instruction, homes, clothing, temporary board, and free Christian schools (not denominational) in destitute districts in the city of New York for neglected children,—is subject to the visitation and examination of the Board of State Commissioners of Public

The New York Juvenile Guardian Society v. Roosevelt.

Charities, in accordance with the powers and duties conferred on them by L. 1873, c. 571, § 4, in regard to any charitable, eleemosynary, correctional or reformatory institutions of this State (excepting prisons), whether receiving State aid or maintained by municipalities or otherwise.

The legality of the appointment of certain members of the Board of State Commissioners of Public Charities cannot be inquired into in an equitable action to restrain them from doing certain acts which they claim by virtue of their appointment as such commissioners to have the power to do.

The examinations and inspections made by the Board of State Commissioners of Public Charities are not in the nature of an action or proceeding against the institutions examined, and the commissioners are not obliged to conduct them according to the forms of a civil or criminal action or proceeding; the examination may be secret and not based on any specific charges, nor confined to any particular points, and the institution examined is not entitled to notice of the course the examination is to take, or to have notice of what is done, or to be present by its officers or counsel at the taking of testimony, or to cross-examine the witness produced, or to introduce witnesses.

MOTION to vacate an injunction. The facts are fully stated in the opinion.

CHARLES P. DALY, Chief Justice.—At the close of the argument in this case, I expressed my conviction that the injunction which has been granted, could not be sustained, and stated orally my conclusions upon the other questions discussed, and gave my reasons. But as the plaintiff desired that the authorities cited might be carefully examined by him, as well as by the court, and that he might submit a further brief in the case, liberty was given him to do so. His further brief has been submitted and considered, the various authorities cited have been read by me, and the result of the examination is that I have but to reiterate in a more deliberate form the views and conclusions previously expressed.

It was decided in *Brandreth v. Lance* (8 Paige, 24) that a court of equity has no jurisdiction to restrain the publication of a pamphlet or literary work upon the ground that its publication would be libellous, and the reason given by the chancellor was, that to assume jurisdiction in such a case or in any other case of a like nature, would be infringing upon the liberty of the press, and attempting to exercise a power of

The New York Juvenile Guardian Society v. Roosevelt.

preventive justice, which the Legislature has decided cannot be intrusted to any tribunal, consistently with the principles of a free government. The cases of *The Springhead S. Co. v. Riley* (E. L. R. 6, Equity cases 561), and *Dixson v. Holden* (7 id. 488), are English cases; and if they even went as far as is claimed, they would be no authority in this State for disregarding the decision of Chancellor Walworth in the case above cited. In the last of these cases (*Dixson v. Holden*), Vice-chancellor Malins undertook to qualify the well-settled rule in England, that a court of equity would not restrain by injunction the publication of a libel, by holding that it would restrain it, if the effect of the publication would, in addition to its libellous character, be injurious to property.

The propriety of any such qualification was questioned by Vice-chancellor Wickens in the subsequent case of *Mulkern v. Ward* (E. L. R. 13, Eq. cases 619), and was expressly overruled afterwards in *The Prudential Assurance Co. v. Knott* (E. L. R. 10, Chancery App. C. 142), showing that the law in England, in this respect, is substantially the same as in this State.

What is averred in the complaint, in the present case, is, that the defendants, as members or visitors of the State Board of Charities, claim the power and right to publish, or authorize to be published, the proceedings before them, in their inspection and examination, under the statute, of the affairs and conduct of the New York Juvenile Guardian Society and its officers, which examinations, it is averred, are secret and *ex parte*; from which the society or its officers are excluded, or are so conducted, as that only one officer or employee of the society could be before the defendants at any one time, and in which they exclude the society from being present by counsel, and deny their right to cross-examine the witnesses, or to produce testimony on its own behalf, or to know, except from the publication of the proceedings, what charges were made against the society or its officers; and that the publication referred to, consists of evidence, some of which is taken in the form of affidavits, and some in the form of verbal and unsworn statements, charging the society and its officers

with mismanagement of its direction and affairs; the perversion or waste of the contributions or donations received by it; the abuse of its power, or perversion of its corporate purposes and duties; and it is further averred that the testimony of the officers and employees of the society is essentially suppressed, or garbled and perverted in the publication of it; whereas, if truly reported, it would have justified the work and conduct of the society; and that the accounts of the proceedings, as published, so far as it reflects upon the society or its officers, is untrue, defamatory and libellous.

It appears from the affidavits that the investigations conducted by the defendants have been attended by reporters of the public press, and that the publications which have appeared, are of such proceedings as were taken down by the reporters and published in the respective newspapers by the proprietors of which the reporters were employed.

Conceding that this is done with the authority and assent of the defendants, and that the matter thus published is defamatory and libellous, as averred, the publication cannot be restrained by a court of equity; and those injured by such publications, if they are libellous, must seek their remedy by a civil action, or by an indictment in the criminal courts; there being no authority, in this court, as a court of equity, to restrain any such publication; the exercise of any such jurisdiction being repugnant to the provision of the Constitution, which declares (art. I. § 8,) that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the *abuse* of that right; and that no law shall be passed to restrain or abridge the liberty of speech or of the press.

This applies to the temporary injunction that has been granted, which is, that the defendants be restrained from publishing any false, defamatory or libellous statements concerning the society or its officers; as well as to the more extensive relief that is asked upon the present motion, which is, that the publication of the proceedings that have taken place upon the investigation, be restrained as defamatory and libellous. The plaintiffs also ask that the defendants be

The New York Juvenile Guardian Society v. Roosevelt.

enjoined from carrying on any such investigation ; or if that is denied, that they be restrained from conducting it, except in the manner pointed out in the complaint.

The plaintiffs deny that the State Board of Charities or the defendants have any visitatorial power over, or in respect to the New York Juvenile Guardian Society, or any power to compel the production of its books and papers, or the attendance of its officers, employees, or other persons, for examination, or as witnesses ; or if they have, that they cannot use it in the manner in which they have done ; but only in open and public examinations, on due notice to the society, and with the right, on its part, to be furnished with the charges against it or its officers ; to be present upon all such examinations by counsel ; to cross-examine witnesses ; to produce witnesses on its own behalf and generally the right to a full view and knowledge of all the proceedings as they take place.

The three defendants, Theodore Roosevelt, Henry L. Hogue, and Josephine Shaw Lowell, are commissioners of the State Board of Charities, and the powers conferred upon such commissioners by the statute law of 1867 (L. 1867, vol. 2, p. 2396), in respect to investigating the condition, " financially and otherwise," of the charitable institutions they are authorized to visit, are of a very extensive character. Their right of visitation, and their powers and duties in connection therewith, extend to any charitable, eleemosynary, correctional, or reformatory institution of this State (excepting prisons), whether receiving State aid, or maintained by municipalities, or otherwise. (L. 1873, ch. 571, § 4.)

This embraces the plaintiff, the New York Juvenile Guardian Society, which is an institution declared by the complaint to have been organized as a corporate body, under the general act of April 12, 1848, for the incorporation of benevolent, charitable, and missionary societies. It is stated to have been originally organized, under the name of the City Missionary Society, and to have been incorporated in 1866, under its present name of the New York Juvenile Guardian Society, for the purpose of providing instruction, homes, clothing, temporary board, and free christian schools (not

denominational) in destitute districts of this city, for neglected children. This, therefore, clearly shows one of the class of institutions over which the official authority of the defendants extends. Their authority under the act creating the State Board is, as I have said, of the most extensive nature. It embraces in respect to all such institutions, by the direct provisions of the statute, full power at all times to look into and examine their condition financially and otherwise; to examine into their methods of instruction, their government and management, the official conduct of their officers and employees, the condition of the buildings, grounds, and other property connected with them, and into all other matters pertaining to their usefulness and good management; and for this purpose, it is declared that the commissioners shall have free access to the grounds and buildings, and to all books and papers relating to such institutions. All persons connected with them are to give such information as the commissioners may require, who are authorized to administer oaths, and examine any person in relation to any matter connected with the inquiries they are empowered to make.

It is claimed that each of these defendants were, at the time of their appointment as commissioners, officers or trustees of certain charitable institutions over which the State Board of Charities exercised the powers referred to, and could not, therefore, be appointed commissioners, or exercise any of the powers pertaining to that office under the act, which declares that no trustee or other officer of any of the institutions embraced in the act, shall be eligible to the office of commissioner under it.

This is not a matter which can be inquired into in an equitable action like this. If the defendants were not eligible to the office of commissioners when appointed by the governor, and are now without authority of law exercising the duties of such an office, the remedy is by *quo warranto*, the mode prescribed by law for investigating by what authority, if any, a person exercises the powers and duties of a public office. So far, therefore, as the equitable aid of the court is asked to restrain the defendants upon this ground from assuming

The New York Juvenile Guardian Society v. Roosevelt.

to exercise any visitatorial power over the Juvenile Guardian Society, the application must be denied.

The further claim of the plaintiffs that this power of visitation and investigation should be restrained by the court, unless it is exercised upon due and reasonable notice to the society, and upon specified charges served upon, or as expressed, "furnished" to the society, or its officers, and then only in an open and public manner, with the right on the part of the society to be fully informed of everything that takes place; to be represented upon such investigation, in every stage of it by counsel, with the right on the part of the society, or of the counsel employed by it, to cross-examine any witness whose testimony is taken by the defendants, and to examine witnesses on its own behalf, is equally untenable.

It is claiming that the society or its officers are entitled, upon such an investigation, to all the rights secured by the constitution and laws to a defendant in a civil action or proceeding, or to an accused person upon a criminal charge; such as a specification of the claim or charge, the right to cross-examine witnesses called to establish it, to introduce testimony in their own defense, and from the commencement to the close of the proceeding to appear by and have the aid of legal counsel. There is no foundation in such an inquiry as this, for any such claim as a matter of right. The visitatorial power over charitable institutions, and the investigation into their conduct and management, authorized by this act, is in no sense analogous to a civil action or proceeding, or to a criminal accusation or charge, as it does not and cannot result in any judgment or sentence affecting person or property. All the power which the commissioners possess after instituting and completing the investigation they are authorized to make, is to embody the result of their inquiry in an annual report to the Legislature, or to make a special report to the attorney general, to the effect that, in their opinion, some matters in regard to the management or affairs of an institution, subject to their visitation, or to any inmate of it, or some person connected with it (2 L. 1867, p. 2397, § 5; L. 1873, p. 885, § 5), requires legal investigation or action of

some kind ; when it becomes the duty of the attorney general to make inquiry and take such proceedings in the premises as he may deem necessary and proper, reporting his action and the result of it to the State Board.

It is simply a preliminary inquiry that the Legislature may be annually advised of the condition, conduct, and management of institutions of this description, and that that information may be given to the attorney general that he may, in respect to the particular institution to which his attention is called, if he thinks proper, institute legal proceedings against it, by which alone can its rights or those of its officers be affected.

The manifest design of the act, establishing this board, was to create an official body to watch over the manner in which institutions devoted to charitable objects are conducted as a check against abuses by those entrusted with their management; or to prevent such bodies from being created or used under the cover of charity, as a means mainly of private emolument. For a court to hold, under such an act, that notice must first be given to the institution or its officers that an investigation was to be made, and that before it could be instituted at all, the institution was to be furnished with a specification of the charges against it, in respect to which the investigation was to be made, might defeat the very purpose of the act, which obviously is, that these bodies were to be, at all times, subject to visitation and inquiry by the commissioners of the State Board, who, from the whole scope and provisions of the act, are to keep such watchful supervision over them as to prevent the possibility of abuse arising. To hold that the commissioners are not to visit, inquire or examine into their condition at all until something has occurred that the commissioners can put into the shape of specific charges, is to deny that they have any general visitorial power at all, but are to act only when specific charges against the institution, its officers or employees can be made and tried with all the formalities, safeguards and rights that exist in proceedings where a judgment may be rendered that is obligatory upon the individual affected,

The New York Juvenile Guardian Society v. Roosevelt

or which may be enforced against his property, or which will subject him to punishment. Institutions that are properly conducted can have nothing to apprehend from such an inquiry into their management, as it can result only in a statement respecting them, to be made to the Legislature or to the attorney general; but if a specification of the exact nature of the investigation to be instituted must be first made, and it is to be kept within the precise limits of clearly defined and specific charges, it would be, in the case of an institution dishonestly carried on, to put the hypocritical and corrupt managers of such a benevolent trust on the alert, to devise every possible means by which to divert and embarrass inquiry, and prevent a full investigation and exposure of their dishonest stewardship.

Whilst the statute has expressed in most comprehensive terms the scope and breadth of the powers conferred upon the commissioners in the visitation and examination which they are authorized to make, it has not declared in what way it is to be conducted, or imposed any limitation or restriction in respect to it. It is left necessarily very much to the discretion of the commissioners, and although a court of equity might interpose, where there was an abuse of that discretion, to prevent manifest injustice or intolerable oppression, it is very clear to my mind that it should not impose any such obligation as is sought to be imposed by this action. If, in the opinion of the commissioners, it is more desirable to examine the witnesses separate and apart from each other when taking their testimony, the commissioners have the right to do so. This is sometimes granted by the judge in the trial of a cause, and especially in criminal cases, where, in his opinion, it will subserve the ends of justice.

It is also in the discretion of the commissioners whether or not they will allow the society to appear before them by counsel. The right to appear by and have the aid of counsel, as recognized in modern times, and secured in some States by constitutional or legislative enactments, is in the prosecution or defense of some proceeding in a court of justice, or before a legislative body, in proceedings for breach

Gemp v. Pratt.

of privilege, contempt, the right of a member to his seat, impeachments, or any of the offences cognizable before such a body where punishment may be inflicted. (See on the history of this right, Cooley's Constitutional Limitations, p. 230; Forsyth's Hortensius, chap. VIII.; Hawkins' Pleas of the Crown, b. II. c. 139; 5 State Trials, 466, *note*; Cushing's Laws and Practice of Legislative Assemblies, part III. c. 4 and sections 667 and 1035.)

By the Revised Statutes, vol. 2, p. 285, "every person of full age and sound mind may appear by attorney or solicitor, as the case may require, in every action or plea, by or against him in any court;" and by the Bill of Rights (Const. art. I. § 6), "in any court whatever, the party accused shall be allowed to appear and defend in person, as in civil actions." But this is not an action or proceeding in court. It is not, and was not intended to be a judicial investigation. It is a mere preliminary inquiry which may lead to a judicial investigation, but that is all, and it may be conducted in a summary way and in such a manner as the commissioners deem most judicious and best designed to attain the object which the statute has in view.

Injunction vacated.*

FREDERICK GEMP *et al.* against JAMES PRATT.

[SPECIAL TERM.]

(Decided May 14th, 1877.)

The jurisdiction conferred on the Superior City Courts by § 263, subd. 2 of the Code of Remedial Justice (L. 1876, c. 448) over certain transitory actions where the defendant is not a resident of the city where the court is located, and is not personally served with the summons therein, but the cause of action arose in that city, is such as may be conferred on such courts by the Legislature under art. VI., § 12 of the Constitution, providing for the continuance of such courts,

* All parties having acquiesced in the correctness of the decision, no appeal was taken.

Gemp v. Pratt.

with the jurisdiction they then severally had, and such further civil and criminal jurisdiction as might be conferred by law, and such extension of the jurisdiction of these courts beyond what they had at the time of the Constitution, is not such an extension of jurisdiction as has been declared unconstitutional by the Court of Appeals in the case of *Landers v. The Staten Island R. R. Co.* 53 N. Y. 450, and *Hoag v. Lamont*, 60 N. Y. 96.

The case of *Towle v. Covert*, 15 Abb. Pr. N. S. 193, distinguished.

In an action for the agreed price of goods sold and delivered to the defendant in the city of New York,—*Held*, that this court had jurisdiction, although the defendant was a resident of Queen's county and was served with the summons there.

MOTION to set aside the service of the summons and complaint in the action, on the ground that the court had not acquired jurisdiction of the person of the defendant by the service of the summons and complaint on him in Queen's county.

The action was for the agreed price of goods alleged in the complaint to have been sold and delivered to the defendant at the city of New York.

The motion was made on the summons and complaint and an affidavit of the defendant (sworn to May 3d, 1877), in which he swore that he had never been a resident of the city and county of New York; that he was a resident of Queen's county, where he had lived for the last twenty years, and that the summons and complaint had been served on him at Jericho, Queen's county, on April 17th, 1877.

Christian G. Moritz, for the motion.

Charles Mott, opposed.

JOSEPH F. DALY, J.—Under section 33 of the Code this court had no jurisdiction of a merely personal or transitory action, unless the defendant was a resident of the city of New York, or was served with the summons therein. The act of 1873 (chap. 239) conferred jurisdiction over a defendant served with our process in any county of the State, and this included, of course, actions where the cause of action arose in the city of New York, but the defendant did not reside

there, as well as actions where the cause of action did not arise, and defendant did not reside in this city, although jurisdiction was not specifically given in either case, and general language only was used to extend the jurisdiction.

In *Landers v. Staten I. R. R. Co.* (53 N. Y. 450), the Court of Appeals held that the Legislature had no power to confer on a local court (the City Court of Brooklyn) jurisdiction of a personal or transitory action where the cause of action did not arise in the city where such court was located, if the defendant did not reside or was not served with the summons in such city. The case of *Hoag v. Lamont* (60 N. Y. 96) was substantially to the same effect.

In *Bidwell v. Astor Mutual L. Ins. Co.* (16 N. Y. 263), and *International Bank v. Bradley* (19 N. Y. 245), judgments of the Superior Court of the city of Buffalo, a local court, were sustained, the cause of action having arisen in that city, but the defendants served elsewhere, being non-residents of the city.

But in the case of the Superior Court of Buffalo, and the City Court of Brooklyn, jurisdiction in cases where the cause of action arose in the respective cities where those courts were located, independent of the residence of defendants or the service of the summons, was expressly conferred in terms by the statutes. (As to Buffalo, L. 1854, c. 96, §§ 9 and 10. As to Brooklyn, L. 1870, c. 470, L. 1871, c. 282.)

But in the cases cited respecting the jurisdiction of the Superior Court of Buffalo (16 N. Y. 263; 19 N. Y. 245), the question of the constitutionality of the provisions of law conferring such jurisdiction was not considered; and in the cases respecting the jurisdiction of the City Court of Brooklyn (53 N. Y. 450; 60 N. Y. 96), there is no express decision that such jurisdiction was properly conferred, but on the other hand no intimation to the contrary.

As I have said, such jurisdiction is not conferred upon the Court of Common Pleas in express terms, but is included in the general enlargement of jurisdiction enacted by the Legislature in 1873. Whatever enlarged jurisdiction conferred by the act of 1873, does not fall within the view of the deci-

Gemp v. Pratt.

sion in the cases of Landers and Lamont (*supra*), but may be exercised without violating the spirit of those cases, it is the duty of this court to exercise when suitors require it.

The conferring upon a local court (whose jurisdiction is general and unlimited except as to territory) by the Legislature (under the provisions of article VI., sec. 14), of jurisdiction over personal actions where the cause of action arose in the city in which such court is established, is not such an infringement of the Constitution (art. VI., § 6) relating to the general jurisdiction of the Supreme Court and the judicial system of the State, as the jurisdiction attempted to be exercised in the Landers case and the Lamont case (*supra*). Where parties who do not reside in the city come there to make contracts, the Legislature may well give to the local courts of the city power to enforce the contract or to entertain an action for the breach of it, even if it be necessary to send its process into other parts of the State in order to summon the defendants to answer. Especially is this the case where the defendants only are non-residents of the city.

The Remedial Code (sec 263, subd. 2) provides in express terms that this court shall have jurisdiction in such cases, and the codifiers state that provision to be, in their opinion, declaratory of the law as it now exists.

The case of *Cowle v. Covert* (15 Abb. Pr. N. S. 193) does not appear to be a case in which the cause of action arose in this city, and does not, therefore, control.

Motion denied, with \$10 costs to abide event of action.

LLOYD ASPINWALL *against* EBENEZER H. BALCH *et al.*

[SPECIAL TERM.]

(Decided May 21st, 1877.)

A purchaser at a foreclosure sale, is not obliged to bear the loss occasioned to the premises by a fire occurring intermediate the time when the premises are bid off by him and the time at which he becomes entitled to a deed; but he is not entitled

Aspinwall v. Balch.

to be relieved from his contract of purchase in consequence of the damage to the premises occasioned by such a fire, where the damage is comparatively slight, and a full and adequate compensation for it is offered to him.

Where the premises were situated on Broadway in the city of New York, and had been bid off for \$62,500, and the value of the premises consisted chiefly in the value of the land, the building upon it being old and dilapidated, adding very little to the value of the land, and intermediate the day of the sale, and the day when the purchaser was entitled to a deed, the building was damaged by fire to the amount, as estimated by competent appraisers, of \$125.

Held, that the purchaser was not entitled to be relieved from his bid, but that upon the premises being repaired, or an adequate compensation therefor being tendered him, he was bound to pay the purchase price.

Held, further, however, that an offer to transfer to the purchaser a contract of insurance on the premises for an amount sufficient to cover the loss was not a good tender of compensation.

The test as to whether or not, in case of damage to or destruction of the buildings on the premises before the day for the delivery of the deed, the purchaser is entitled to be relieved from his bid, is whether the substantial inducement to the purchase has failed, and this cannot be predicated where a slight damage has been done to the buildings by fire, which can be readily compensated for out of the purchase money or otherwise.

APPLICATION by a purchaser at a foreclosure sale to be relieved of his bid and to have the portion of the purchase money deposited by him at the time of the sale, returned to him.

The facts are fully stated in the opinion.

CHARLES P. DALY, Chief Justice.—This is an application to the court by the purchaser at a foreclosure sale of a house and lot, to be relieved of his bid and to have the ten per cent. of the purchase money (\$6,275) deposited at the time of the sale, restored to him, upon the ground, that after the sale, and before the time for the delivery of the deed and the payment of the residue of the purchase money, the building was materially damaged by fire. He charges that by reason of the damage done to the building, there is a partial failure of the consideration; that the loss by reason of the fire falls upon the owner and not upon him; that it is to be borne by the owner and the mortgagee, and that he is not

Aspinwall v. Balch.

bound to take, as the thing purchased, the land with the building diminished in value in consequence of the fire.

He is, in my opinion, right in claiming that the loss occasioned by the fire falls upon the owner and the mortgagee, and not upon him. He does not become the owner until the delivery of the deed, nor is he equitably to be regarded as the owner, so as to impose upon him any loss or burden, until the time fixed for the delivery of the deed, when, by the payment or tender of the purchase money, he acquires the right to the immediate possession. Whatever may be the rule between vendor and vendee upon an ordinary contract of sale, or where by the terms of the sale the purchaser takes possession, or has the right to do so, or an authority to exercise acts of ownership is conferred upon him, before the time for the delivery of the deed and the payment of the purchase money, a purchaser at a foreclosure sale who is not to go into possession until the delivery of the deed and the payment of the purchase money, acquires no title; but the owner of the equity of redemption is entitled to the possession and has the right to the rents and profits; for as between him and the purchaser at the foreclosure sale there is no such relation as exists between vendor and vendee; the foreclosure being a proceeding in hostility to him. All that the purchaser acquires by the sale is a right to the deed at the time appointed; but until that time arrives, he is entitled to none of the benefits, nor charged with any of the burdens incident to ownership. (*Mitchell v. Bartlett*, 51 N. Y. 452; *Fuller v. Van Geesen*, 4 Hill, 173; *Cheney v. Woodruff*, 45 N. Y. 100; *Wicks v. Bowman*, 5 Daly, 225; *Tabor v. Robinson*, 36 Barb. 483.)

But it does not follow that because the loss occasioned by the fire is to be borne by the owner of the equity of redemption and the mortgagee, that the purchaser is to be relieved from his contract. If intermediate the sale and the time of performance, the property is so materially injured by fire or other cause, as to be greatly diminished in value, the purchaser is not obliged to accept it (*Wicks v. Bowman*, *supra*; *Smith v. McClusky*, 45 Barb. 612.) In the first of these

cases, the dwelling-house, which constituted seven-eighths of the value of the premises, was totally destroyed by fire, between the time of the making of the agreement, and the time of performance, and we held that the purchaser was not bound to take the vacant lot in fulfillment of the contract. In the last case, the building which constituted the principal value of the premises, was destroyed by fire, and the court held that the purchaser was discharged, as the loss fell upon the owner, and the performance of the chief matter of the contract on his part had become impossible. In *Wood v. Hubbel* (5 Barb. 601; 10 N. Y. 488) the building demised was destroyed between the time of the execution of the lease and the commencement of the term, and before the lessee had taken possession. It was held that he was discharged, as the landlord was unable to give him the thing demised; that the loss fell upon the landlord and not upon the tenant; that the tenant was prevented from taking possession without any fault on his part, and that it would be inequitable to compel him to pay for the use of that of which he could have no enjoyment.

In *Murray v. Richards*, (1 Wend. 58), where the property sold was a vessel, and before delivery she was destroyed by fire, it was held that the vendee could recover back the purchase money, as the delivery of the thing contracted for was impossible. And see in recognition of this rule, *Graves v. Berden* (29 Barb. 100; 26 N. Y. 498).

But where the injury to the premises from the accident is comparatively slight, and a full and adequate compensation for it is offered to the purchaser, there is no reason why he should be relieved from the contract; that rule applying only where the delivery of the substance of the thing has become impossible, but not where some slight injury has arisen which can be easily repaired, and the expense of which the owner is willing to bear. (*Winne v. Reynolds*, 6 Paige, 412; *King v. Bardeau*, 6 Johns. Ch. 38; *Magennis v. Fallon*, 2 Moll. R. 588; *Calcraft v. Roebuck*, 1 Vesey, jr. 221; *Drewe v. Hanson*, 6 Vesey, 678; *Stapylton v. Scott*, 13 Vesey, 425; *Halsey v. Grant*, id. 78; *Drewe v. Corp*, 9 id. 368.)

Aspinwall v. Balch.

The test appears to be whether the substantial inducement to the purchaser has failed, and this cannot be predicated where a slight damage has been done to the building by fire, which can be readily compensated for out of the purchase money or otherwise. Such is the present case. The property purchased at the foreclosure sale consisted of a lot No. 928 Broadway, in this city, with a building upon it which was old and dilapidated, adding very little to the value of the premises, their value consisting chiefly in the value of the land. The purchase price was \$62,500. The injury done to the building was slight. It appears by the testimony of Mr. Smith, an insurance surveyor, in this city, whose business it has been for twenty years to examine buildings and adjust losses by fire for insurance companies, that the whole of the damage occasioned by the fire can be repaired for the sum of \$125, and there is submitted with the papers a written proposal of Edward Smith, a responsible and capable builder in this city, to repair the building for that sum. It appears, further, that the loss is covered by insurance, and the offer is made upon the motion to transfer the insurance to the purchaser upon the delivery of the deed. The injury from the fire occurred on the 11th of March, but there was no refusal or intimation given by the purchaser that he would not take the premises for that reason, until the 7th of April following, which was more than a week after the time for performance. Having failed to perform, the property, according to the terms of sale, was again advertised for sale by auction, the terms of sale providing that if the purchaser failed to comply with the conditions, that the premises might, without any application to the court, be put up again at auction, and the purchaser held liable for any deficiency. It may be doubted if this could be done without first offering to compensate the purchaser for the injury occasioned by the fire, either by allowing the amount out of the purchase money, or by offering to repair the building, so as to put it in as good a condition as it was before. The present application to relieve the plaintiff from his contract will have to be denied, with the understanding, however, that the parties are ready and

Davidson v. Blumor.

willing to make full compensation for the injury done by the fire. If after they have done that, the purchaser still refuses to take the property, then, in my judgment, according to the conditions of sale, they will be entitled to put it up again at auction, and hold him responsible for any deficiency.

The difficulty on the part of those foreclosing the mortgage has arisen, I apprehend, from their impression that the loss occasioned by the fire fell upon the purchaser, and not upon them. It will now, however, be in their power either to repair the building or to offer an adequate compensation therefor; for the purchaser is not bound to take a transfer of the insurance, with the risk of being indemnified or not by that means; and if within a reasonable length of time, they make no adequate offer of compensation, or do not themselves repair the building, then the purchaser will be at liberty to renew this motion to be discharged from his contract.

Motion denied.

JACOB DAVIDSON, Appellant, *against* JACOB BLUMOR,
Respondent.

(Decided May 21st, 1877.)

Where the plaintiff had orally leased premises to the defendant for the term of a year, and afterwards an agent of the plaintiff's for collecting rent, collected a month's rent in advance and gave a receipt therefor, which stated that the letting was for a month only and that the term would expire on the first of the next month, and the plaintiff had received the rent so collected, but had given no authority to the agent to give such a receipt:—*Held*, the clause in the receipt as to letting for a month was not a rescission of the yearly renting and a new letting for a month, under which the defendant would have a right to quit the premises at the end of that month and avoid payment of further rent.

APPEAL by plaintiff from a judgment of the Second District Court in the city of New York.

The action was to recover \$41 69, rent for the month of

Davidson v. Blumor.

April, 1875, of premises in New York city, upon a hiring for a year from May 1st, 1874. The defendant put in a general denial, and upon the trial sought to show that the letting was a monthly letting, and that his term had expired on April 1st, 1875, and did show, without contradiction, that he had vacated the premises before that time.

To show that the term expired on April 1st, 1875, the defendant put in evidence a receipt for the rent for March, 1875, in the following form (the parts in italics only being written):

New York, *March 1st*, 1875.

Received from Mr. *Jacob Blumor* the sum of *Forty-one* Dollars *67* Cents, being in full for one month's Rent, due in advance, for *upper front* in House No. *172 Canal St.* in the city of New York, and it is expressly understood that the letting is for one month only, and is to expire on the first day of *April* next.

Jacob Davidson,
J. D.

The facts brought out on the trial in connection with this receipt and the ruling of the justice thereon are stated in the opinion.

The defendant also attempted to show that the plaintiff had accepted the surrender of the premises, and put a tenant in before the expiration of the month of April, 1875, and upon this there was conflicting evidence.

CHARLES P. DALY, Chief Justice.—This judgment will have to be reversed. The testimony of both the plaintiff and the defendant was to the effect that the premises were hired for a year, the rent being payable monthly in advance. There was no conflict between them as to the fact that the letting and renting was for a year, and it is evident from the ruling of the justice that he regarded the receipt for the month of March as conclusive upon the plaintiff, because it contains the words, "it is expressly understood that the letting is for one month only, and to expire on the first day of

April next." If this receipt had been signed by the plaintiff, it might have been conclusive as against him, so as to preclude him from showing by parol that the hiring was for a year. But the defendant himself admitted that he had hired for a year, and even if he had not, the receipt would not stop the plaintiff from showing that that was the fact. The receipt was signed in the plaintiff's name by his son, who was not shown to have any authority to vary the terms of the lease. The receipt was a printed form and the words referred to were a part of the printed form. It was the ordinary form of a receipt for premises let by the month. All that was in writing being the date, the name of the tenant, the number of the house, the street, the amount of the monthly rent, and the landlord's name, to which the son affixed his initials. For all that appears, the son may have known nothing about the period for which the premises were hired, or may have supposed that the letting was by the month only. He was authorized only to collect the rent. He swore expressly that he had no authority to give such a receipt, and as an agent for collecting rent he had no authority, in giving a receipt for it, to sign a receipt for the plaintiff in this printed form with such a stipulation in it. It was a mistake on his part, and in no way binding upon the plaintiff. The judge, under the plaintiff's exception, excluded the plaintiff from giving any testimony except as to what took place after the receipt was given, showing very clearly that he regarded the printed stipulation in the receipt as binding the plaintiff, and conclusive upon him.

There was conflict as to whether the landlord let the premises before the first of May, or rather as to whether the new tenant went into possession with his assent or authority before the time; but it is evident that the justice did not put his decision upon the ground of a surrender. If he had, his judgment might have been conclusive. We cannot say that he believed the testimony of the new tenant and disbelieved that of the landlord. For all that we know, he may never have considered the question of surrender at all, as he regarded the receipt as settling what the terms of the tenancy

Toope v. Prigge.

were, and placed his decision and judgment upon a ground that was clearly erroneous. The judgment is, therefore, reversed.

ROBINSON and LARREMORE, JJ., concurred.

Judgment reversed.

CHARLES TOOPE *et al.* Appellants, *against* CHARLES H. D.
PRIGGE, Respondent.

(Decided June 4th, 1877.)

Where the plaintiffs in a proceeding against the owner and contractor to foreclose mechanics' liens on a building towards the erection of which they had furnished work and materials, pleaded that they had furnished such work and materials under a sub-contract with the contractor:—*Held*, that the judgment on that proceeding adjudicating that the plaintiffs had furnished such work and materials at the request of the contractor was a bar to a subsequent action by them against the owner to recover for furnishing the same work and materials upon the allegation that they had been furnished at the owner's request.

APPEAL by the plaintiffs from a judgment of the Marine Court of the city of New York entered upon a decision of the general term of that court, affirming a judgment entered upon a verdict in favor of defendants, rendered by direction of the court at a trial before a judge of that court and a jury, and affirming an order made at a special term of the Marine Court, denying a motion for a new trial made upon a case and exceptions.

This action was brought to recover of the defendant, Prigge, the sum of \$630, which the complaint alleged remained unpaid of the price and value of materials sold and delivered to defendant, and of work done in placing said materials in a building in the course of erection in the city of New York.

Toope v. Prigge.

The answer was a general denial and the separate defense that theretofore the plaintiffs had filed a notice of mechanic's lien against Prigge as owner, and against J. & J. W. Thornton as contractors on the building; that afterwards proceedings were instituted to enforce said lien and to obtain a personal judgment against Prigge, which proceedings were still pending and were a bar. The answer was amended at the trial, by alleging the termination of said proceedings by an adjudication in favor of Prigge and against plaintiffs.

The plaintiffs introduced evidence to show that after they had manufactured a small part of the materials to be supplied by them under their contract with the Thorntons for the erection of the building, but before any of their materials had been delivered, they stopped work on the contract out of distrust in the ability of the Thorntons to pay them; that then the defendant visited their place, inspected the materials furnished, expressed his satisfaction, and desired them to proceed, saying that he would pay them if they went on and fulfilled the contract.

The defendants then put in evidence a notice of lien under the Mechanic's Lien Act of 1863, in which notice the sum of \$630 was claimed to be a lien on the building for the materials and labor furnished in pursuance of a contract with the Thorntons; and a judgment roll in an action in this court to foreclose a mechanic's lien on the building above mentioned, in which action Joshua S. Peck and another were plaintiffs, and Prigge, the Thorntons, Charles Toope, George H. Toope and other lienors were defendants. Included in the judgment roll was the answer or statement of claim of Charles and George H. Toope, in which it was alleged that they, in pursuance of a contract with the Thorntons, sold and delivered to them materials and did work on the buildings, for which there was due \$630, and there was demanded judgment of foreclosure and sale and a personal judgment against the Thorntons and against Prigge. The judgment roll contained the answer of Prigge denying each and every allegation of the statement of the Toopes, except that he admitted that he was the owner, and was indebted to the

Toope v. Prigge.

Thorntons under his contract with them to furnish all the material and do all the work on the building. The judgment roll contained, also, the report of a referee, to whom the issues were referred. This report contained a finding of fact that Charles Toope and George H. Toope furnished materials and did work for and at the request of the Thorntons of the reasonable value of \$1,400, and that they duly filed their lien. The report contained no other finding or adjudication as to the claim of the Toopes, nor did the judgment entered upon the report of the referee. The judgment was for the foreclosure and sale of the building and premises and for the payment of the claims of other lienors. With the introduction of this judgment roll the defendants rested, and the court directed a verdict to be rendered against the plaintiff, holding that the issues involved had been litigated or might have been litigated in the action to foreclose the mechanic's lien, and that the judgment therein was a bar to the present action. The plaintiffs excepted to the direction of a verdict.

H. Bell, for appellants. The judgment was not a bar. (*Stowell v. Chamberlain*, 60 N. Y. 272; *Driggs v. Simson*, id. 641; *Gambling v. Haight*, 59 N. Y. 354; *Sullivan v. Brewster*, 1 E. D. Smith, 686; *Mason v. Alston*, 9 N. Y. 58, 65; *McGraw v. Godfrey*, 14 Abb. Pr. N. S. 398.)

A. F. & W. H. Kircheis, for respondents. The judgment was a bar. (*Keene v. Clarke*, 5 Robt. 38; *Demarest v. Darg*, 32 N. Y. 281; *Derby v. Hartman*, 3 Daly, 458; *Schaettler v. Gardiner*, 4 Daly, 56; *Glacius v. Black*, 50 N. Y. 153, 154.)

ROBINSON, J.—Plaintiffs on the 6th of November, 1874, filed a notice under the Mechanic's Lien Law of 1863, against premises in this city, owned by the defendant, alleging a claim against the defendant as owner, and J. and J. W. Thornton as contractors for \$630, a balance of a debt due for materials furnished and labor rendered in and toward the erection of a building on said premises in pursuance of a contract they had made with said Thorntons.

This notice was verified by the oath of the plaintiff,

Toope v. Prigge.

George H. Toope. The work done by plaintiffs was included in the contract between the Thorntons and defendant for the erection of such building.

In January, 1875, Peck & Wandell commenced proceedings in this court for the foreclosure of a mechanic's lien against the same premises as sub-contractors for materials furnished toward the erection of said building under the same contract of defendant with the Thorntons, making the defendant and these plaintiffs parties. These plaintiffs by answer therein also made a statement of their claim by way of lien against the premises, alleging that they had entered into a contract with said Thorntons, who were (as alleged) the contractors with the defendant Prigge, the owner of the building, and that under and in pursuance of that contract, they had sold and delivered the Thorntons the building materials and done the work and labor for which the present claim is made. They also alleged the filing of said notice of lien on the 6th of November, 1874, and that \$630, with interest, was still due them for such materials and labor; that a large sum was due from defendant to the Thorntons, more than sufficient to pay their claim, and they prayed a sale of defendant's property, the application of the proceeds to the payment of the lien on said premises, according to their priorities and for a personal judgment against the Thorntons and defendant for said sum of \$630 and interest. This statement of claim was also verified by the oath of said George H. Toope.

Defendant answered such claim, denying all the allegations therein except that he was the owner of the premises, and that he had entered into a contract with the Thorntons to do all the work on said premises for \$10,500, of which only \$1,500 remained due, which he offered to pay for a discharge of all the liens referred to in said proceedings.

The cause was referred, and the referee by his report, dated in December, 1875, found the making of said contract between defendant and the Thorntons: That the Thorntons proceeded to do and substantially finished the work in accordance with the contract, and by reason thereof, on the

Tooze v. Prigge.

2d of November, 1874, and on the date of the filing of liens in the report mentioned, there was due said Thorntons from the defendant, Prigge, \$1,550, being so much of the price mentioned in said contract as was then unpaid. This sum the referee awarded to other lienors, who had filed their liens for materials furnished and work done for said Thorntons in pursuance of said contract, having precedence to that of the plaintiffs, and he also found that these plaintiffs furnished said materials and performed such labor for and at the request of said Thorntons, and that they had filed their said lien therefor on the 6th of November, 1874. Upon this report a judgment was entered substantially conforming to the report and adjudging that the entire contract work was performed by the Thorntons, and awarding the payment of said balance due of \$1,550 thereon to the persons having precedence to these plaintiffs, such amount being, however, insufficient to satisfy such prior claims. This judgment so far as shown stands in full force. The plaintiffs, notwithstanding such judgment by complaint duly verified in the present action, make a personal claim against the defendant for the balance due them for said materials and work, upon evidence of one of the plaintiffs and another witness, tending to prove that after they had commenced to perform their sub-contract with the Thorntons, and had furnished but a trivial part of the materials, they told defendant they had stopped work on the job; that they wouldn't trust the Thorntons and wouldn't do any work for them; that defendant requested them to go on and finish the work, and said he would pay for it; that he would accept the contract they had with the Thorntons and pay for it; that they resumed work on the job according to the contract they had with the Thorntons. Under this solemn farce of perjury, either in the former or latter proceeding, the plaintiffs present this extraordinary claim. They have already had a finding in their favor, in the former action against the Thorntons, upon their claim as made therein, that they furnished the materials and performed the labor for and at the request of the Thorntons, which were of the reasonable value of \$1,400, which finding

Toope v. Prigga.

would be available for any future action against the Thorntons. It was also therein found and judgment rendered accordingly in harmony with plaintiff's pretensions in that action, that all the work on the building was substantially performed by the Thorntons according to the original contract with the defendant, and an award was made for payment by this defendant of the balance due for entire performance to prior lienors. This plain and patent case is but confused by the technical and elaborate but unappreciable argument of the plaintiff's counsel. The former action was, so far as this defendant and the plaintiffs were concerned, one *in rem*. It adjudged that the moneys now claimed by plaintiffs were due the Thorntons, the contractors, for substantial performance by them of the entire contract; that plaintiffs as sub-contractors became lienors for and in respect to the present claim which they then presented and urged in the double relation of lienors and personal creditors of the Thorntons, and had judgment for it in their favor as due on their sub-contract with the latter. It needs no criticism or weighing of authorities to demonstrate that such a judgment, unreversed and in full effect, must upon every principle of justice be held conclusive upon the rights of the parties, and debar such a claim as is now presented on behalf of the plaintiffs.

It is not necessary to review the multifarious cases cited on the points of the plaintiff's counsel, as no principle can be eliminated from them, giving countenance to so inequitable a claim as is here presented. The judgment appealed from should be affirmed.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Judgment affirmed.

Griswold v. Tompkins.

ALMON W. GRISWOLD, Appellant, *against* HENRY TOMPKINS,
Respondent.

(Decided June 4th, 1877.)

Where it appears in supplementary proceedings that personal property in the possession of the judgment debtor and belonging to him, has been mortgaged by him to another, by a chattel mortgage payable on demand, a judge before whom the proceedings are had, cannot order the debtor to deliver the property to a receiver appointed by him.

Where after the appointment of a receiver in supplementary proceedings personal property belonging to the judgment debtor, and in his possession, is levied on under an execution against his property, the judgment debtor cannot be ordered to deliver the property to the receiver, but the receiver must be left to his action against the sheriff seizing it to recover it from him.

APPEAL from an order of the general term of the Marine Court of the city of New York, affirming an order made by a judge of that court at chambers, denying a motion for an attachment against the defendant for an alleged contempt in failing to obey an order directing him to deliver certain property to a receiver appointed in supplementary proceedings against him.

On May 15th, 1876, an order was granted by Justice McAdam, requiring the defendant to appear before him and be examined in supplementary proceedings, based on a judgment entered in said court in favor of the plaintiff, against the defendant, on which execution had been issued and returned unsatisfied, and a transcript whereof had been duly filed in the office of the clerk of New York city and county.

The defendant was afterwards examined, and disclosed certain property in his possession on which, however, he claimed there was a demand mortgage to his mother, whereupon, on plaintiff's application, an order was made by the court, at special term, appointing a receiver, to whom defendant was ordered to deliver the disclosed property. The receiver demanded the property of the defendant, who declined to comply with the demand.

Griswold v. Tompkins.

Subsequently to the entry of the order appointing the receiver, and before he made the demand, the sheriff levied on all the property in question under an execution in his hands issued on a judgment in favor of a third party, which levy was in full force at the time the demand of the receiver was made.

On the foregoing facts, the plaintiff moved for an attachment against defendant for contempt, which was denied.

Plaintiff appealed to the general term of the Marine Court, which affirmed the order.

Charles Lee Clarke, for appellant.

George Tompkins, for respondent.

CHARLES P. DALY, Chief Justice.—There may be some doubt whether an appeal will lie in this case, but I do not propose to examine the question, as it is one of some difficulty, because, assuming that it would lie, there would be no ground whatever for reversing the order of the general term of the Marine Court.

The defendant in his examination, in supplementary proceedings, testified that the property specified by him, a watch, chain, and office furniture, was mortgaged to his mother.

This property Judge McAdam had no authority to order him to deliver to the receiver, as the defendant's mother was no party to the proceedings, and there was no equitable authority in the judge to divest her of her title to the property as mortgagee. To reach it, the receiver would have to bring an action, making her a party, if the mortgage was fraudulent, which it may have been, as the property was left in the possession of the mortgagor. The defendant also disclosed upon his examination that he had some law books, and a few miscellaneous books at his boarding house, and it further appeared, on the motion for the attachment, that he had, about eight months before his examination, executed chattel mortgages to his mother of his law books, both of which mortgages were on file. Under these circumstances, Chief Justice Shea

Smith v. Salomon.

very properly denied the motion to attach the defendant for refusing to deliver the property to the receiver, and the general term was right in affirming his decision. (*Gardner v. Smith*, 29 Barb. 68.)

In addition to this, when the demand was made upon the defendant to deliver this property to the receiver, it had been levied upon by an execution, issued upon a judgment recovered against the defendant by another creditor, and was not, therefore, in the defendant's custody, but in the custody of the sheriff under that execution, and the receiver's remedy, if he had any, was against the sheriff who held it adversely to the receiver's title.

The affirmance of the order denying the motion for attachment, being in my judgment right, I deem it unnecessary to consider the other questions discussed, viz: 1st. Whether the appeal will lie; 2d. Whether supplemental proceedings can be had in the Marine Court, where a transcript of the judgment is filed with the county clerk; and 3d. Whether the order directing the delivery of the property, being an order of the Marine Court, was valid; this proceeding being a proceeding before a judge out of court, and not a proceeding in court. (*Bitting v. Vandenburg*, 17 How. Pr. 81.)

ROBINSON and LARREMORE, JJ., concurred in the result.

Order affirmed.

MARTIN V. B. SMITH, Survivor, &c. Appellant, *against*
RUDOLPH G. SALOMON *et al.* Respondent.

(Decided June 4th, 1877.)

Where to a complaint for a balance of the contract price of goods sold and delivered, the answer confesses the cause of action and sets up the defense that plaintiffs under a composition agreement, had agreed to receive and had received 50 per cent. as full payment, the plaintiffs may prove in avoidance of the composition agreement, that it was fraudulently procured by the defendants.

Smith v. Salomon.

When a creditor's signature to a composition agreement has been obtained by fraud on the part of the debtor, the creditor may, upon the discovery of the fraud, although he has received under the composition agreement the amount therein specified to be in full payment of his debt, maintain an action on the original cause of action for the unpaid balance, without first bringing an equitable action to set aside the composition agreement as fraudulent, and without having first restored or offered to restore the amount received under such agreement.

Evidence that the defendant, to induce plaintiff to sign the composition agreement, had represented to him that the assets of the firm would not pay more than 50 cents on the dollar; that in fact a surplus remained after that payment, that the defendant had confessed that he had secreted goods and kept two sets of books, one of which was afterwards destroyed, is sufficient to raise the question for the jury of whether or not the composition agreement was obtained from plaintiff by fraud. Per CHARLES P. DALY, Ch. J.

APPEAL from a judgment of this court entered upon an order dismissing the complaint made at a trial before Judge ROBINSON and a jury.

This action was brought by Smith, the surviving partner of E. A. Smith & Brothers, against the defendants, who composed the firm of Salomon & Morol, to recover an unpaid balance of the price of goods sold and delivered.

The answer of the defendants admitted the sale, delivery and price, and set up as a defense that plaintiff's firm, with other creditors of the defendants, had signed an agreement of composition, whereby plaintiff's firm agreed to receive, in full payment of the price of the goods, the promissory notes of the defendant's firm, indorsed by the father of one of the firm for 50 cents on the dollar; that plaintiffs had received said notes, and that the notes had been paid before the commencement of the action.

At the trial the composition agreement, the giving of the notes, and their payment were proven. Evidence was then given on behalf of the plaintiff tending to show that the plaintiff's firm had been induced by fraud to sign the composition agreement. After this evidence had been introduced a motion was made to dismiss the complaint, which was granted on the ground that the plaintiff had misconceived his remedy, and that his action should have been to set aside the composition agreement or for damages for the deceit.

Smith v. Salomon.

W. T. B. Milliken, for appellant.

Blumenstiel & Ascher, for respondent.

CHARLES P. DALY, Chief Justice.—The plaintiffs signed the composition deed, by which they agreed to take fifty cents on the dollar, to be secured by the defendant's promissory notes, indorsed by David Moral, the father of one of the defendants. The defendant had previously made an assignment, for the benefit of creditors, to one George Rothstein, and to carry into effect the composition deed, an instrument was entered into by the defendants, by Rothstein, the assignee, and by David Moral, the indorser of the composition notes, by which all the defendant's property was assigned to David Moral, to indemnify him for indorsing the notes; he agreeing by the instrument to sell the property and apply the proceeds to the payment of the composition notes, after the payment of certain sums which were provided for in the instrument, for legal expenses, and for the services and expenses previously incurred by Rothstein, the assignee. The instrument declared that it was entered into with the consent of the defendant's creditors, and under it, David Moral paid the plaintiff the composition notes received by him, and after discharging the trust, there was, it would seem, a surplus in the hands of David Moral. It further appeared that Salomon, the defendant, commenced an action to compel him to pay and deliver to him any assets or property remaining in his hands, and a decree to that effect was obtained, but with which Moral has been unable to comply, the creditors of the defendant having attached the property in his hands.

The present action was brought by the plaintiffs to recover what was due on the original debt, upon the ground that the composition was fraudulent on the part of the defendants, and the composition deed null and void for that reason as respects the plaintiff's firm and the debt due to it.

The plaintiff signed the composition deed, upon a representation made to him by Salomon, and by David Moral, the

Smith v. Salomon.

subsequent trustee, that the defendant's assets would pay only fifty cents upon the dollar of their indebtedness, which representation the plaintiff claimed and showed in this action to be false and fraudulent, it appearing that Salomon had a double set of books, one set of which he afterwards destroyed, and that he had stowed away a part of the partnership property in a loft with intent to keep it to himself. It also appeared that after the settlement, and after David Moral, the trustee, took possession under it, he obtained possession of certain goods which defendants had shipped to Germany and Philadelphia, and four or five weeks after the settlement he learned from Salomon, as he said, to his astonishment, that he had two sets of books, which he declared, if he had known, he would have had nothing to do with the settlement, as he "was of the impression that all things went honest and straight," and Salomon also told him that he had stock stowed away on the top loft, as the witness supposed, to keep it for himself, and which Moral, the witness, subsequently got into his hands as trustee.

The plaintiff learned of the fraud two or three weeks before the commencement of this suit. The composition notes he had received were not then fully paid, but were paid, it would seem, before the commencement of this suit, and the general objection was taken, that the plaintiff's firm, having thus availed themselves of the composition, and received the benefit of the payment of the notes secured by the endorsement of David Moral, they could not disaffirm the composition on the ground of fraud, without restoring what they had received. It was insisted that the plaintiff, the surviving partner, could not recover in an action brought for the balance of the debt, which, it is claimed, became merged in the composition; that he had either to bring an action in equity, to set aside the composition deed, or bring an action for damages. The judge non-suited him on the ground that he had entirely misconceived his action, and as I infer from the judge's language, he thought the plaintiff's only remedy was by a bill in equity to set aside the composition for fraud, or to sue for the deceit; that he could not sue for the balance

Smith v. Salomou.

of the debt, upon the ground that the composition was fraudulent.

I do not see why the plaintiff was not entitled to maintain this action. The composition deed may have been fraudulent as respects him, and not as to the other creditors. If no such representation was made to them, the composition agreement as to them would be valid, but the representation made to the plaintiff's firm was a material one, and if false, the composition as respects that firm was fraudulent. It is not the case of a party repudiating a contract for fraud, and bringing an action to recover damages for the injury he has sustained, to maintain which, he must, before the action is brought, restore, or offer to restore, what he has received under the contract. It is an action brought to enforce a contract, and in which a composition to receive fifty per cent. in discharge of the claim is set up by way of answer, and is met by the objection, that the creditor was induced by fraudulent representations on the part of the debtor to sign the deed of composition, and that consequently it is fraudulent and void as against him. It does not come, therefore, within the class of cases upon which the respondent relies. The plaintiff has received nothing that he can be required to give up. He has only been paid one-half his claim, and paid out of the assets of his debtor, in the hands of a trustee who has or will have a surplus after the payment of all the composition notes. I can see no reason why he should be put to an equitable action. He is seeking no remedy as against the trustee, or as against the assigned property. He is merely seeking in this action to enforce the payment of the whole debt, upon the ground that the defendants have never been discharged from it, they having by false and fraudulent representations induced the plaintiff to sign the composition deed. As between the plaintiff and the defendants, this question of fraud may as well be passed upon in this action as in any other. The court has all the necessary parties before it that will or can be affected by the judgment, whether it is rendered for the plaintiff, or for the defendants, and I see no reason why the plaintiff should be turned over to an action for deceit,

or any other form of action, but the one brought to determine whether the defendants are, as between them and the plaintiff, discharged from the payment of the residue of the debt. In other words, whether the composition deed, as respects the residue of the debt, is or is not binding upon the plaintiff. That issue can be fully tried in this action, and fully disposed of without affecting any other parties to the composition deed.

If there was fraud on the part of the defendants in procuring the signature of the plaintiff's firm, and the composition is on that account void, as respects that firm, the more direct course is the one the plaintiff adopted, to sue for the residue of the debt, instead of bringing an action for damages, or an action in equity to be relieved from the composition.

If the representation made by a debtor to a creditor respecting his property is in any material respect untrue, the misrepresentation will vacate the compromise as to him, and if a release has been signed, a court of equity will vacate it. (*Irving v. Humphrey*, Hopk. 286.)

It is not necessary, however, especially under our present system, that the plaintiff should resort to an equitable remedy. The rights of the parties can be as fully determined in an action against the debtor to recover the residue of the debt, as it would be in an action by the plaintiff to set aside the composition deed, as respects his claim. If he desired to reach the debtor's property, as in *Irving v. Humphrey* (*supra*), and have it applied to the payment of the residue of his debt, he would have to proceed in equity to obtain a full account of the debtor's property, and if it exceeded the amount necessary to pay the composition, to ask that the residue might be applied to the full payment of his debt. No such relief, however, is sought in this action. The plaintiff merely asks a judgment against the defendants for what remains due of the original debt. The composition notes, as appears by the testimony of David Moral, the trustee, have all been paid by funds in his possession, and it appears that there will be a surplus in his hands, to which the defendants have become entitled, and which, in an action between them

Smith v. Salomon.

and the trustee, it has been decreed is to be paid over to them by the trustee. I see no reason, therefore, if the composition was fraudulent as against the plaintiff's firm, why the plaintiff should not have judgment against the defendants in this action for what remains due of the original debt.

If a creditor compounds with his debtor under a false impression as to the extent of the debtor's estate, in which the debtor knowingly leaves him, the creditor is not estopped from suing for the balance of the debt (per Tindall, J., in *Vine v. Mitchell*, 1 M. & Rob. 337); and where a debtor represents to a creditor that if he will assent to the composition all the others will do the same, and the creditor agrees to it, the composition will not be binding upon him, if the representation made to him were untrue. (*Cooling v. Noyes*, 6 T. R. 263; *Reay v. Richardson*, 2 C. M. & R. 422; 5 Tyr. 981; 1 Gale, 219; *Lewis v. Jones*, 8 D. & R. 567; 4 B. & C. 506.)

In *Jackson v. Myers* (18 Johns. 425) an action of ejectment was brought to recover a house and land sold under an execution, and which at the time of the sale was in possession of the defendants under a deed from the judgment debtor, which was fraudulent and void as against creditors. The deed being interposed as a defense to the action, the plaintiff was allowed to show that it was fraudulent and void, and the plaintiff recovered. And in *Fox v. Hills* (1 Conn. R. 295) it was held that such a deed, irrespective of the statute, was void at common law. I do not see why, upon the same principle, the plaintiff could not show in this action that the composition deed was fraudulent and void, as against him and his firm.

In *Russell v. Rogers* (15 Wend. 351) the debtor assigned to his creditor a judgment with the usual covenant. He afterwards fraudulently received payment of the judgment, and discharged the judgment debtor. The creditor, in ignorance of what the debtor had done, united with the other creditors in a general release of all claims and demands against the debtor, he having executed a composition deed to a trustee for the benefit of all his creditors. The creditor

Smith v. Salomon.

upon learning the fraud that had been practised upon him, brought an action against the debtor for a breach of the covenant in the assignment of the judgment, to which the defendant demurred; but it was held that the action could be maintained; that by *reason of the fraud*, the release and composition deed did not operate to discharge the debtor from the covenant in the assignment.

Courts of law and of equity have concurrent jurisdiction to relieve against fraud (*Bright v. Eynon*, 1 Burr. 396); the distinction being that in courts of law it must be proved, and that in equity it may be presumed. (*Jackson v. King*, 4 Cow. 220; *Champion v. White*, 5 id. 509.) The plaintiff was not obliged to seek relief in equity, because the composition deed or release was sealed, the consideration being open to inquiry and examination to the same extent as if it were a contract by parol. (*Wilson v. Baptist, &c. Co.* 10 Barb. 312, 313.)

There may possibly be some doubt whether the evidence proved that Salomon fraudulently represented the value of the firm's assets to be less than it actually was, but I think there was sufficient to make it a question for the jury. The material circumstances were, Salomon keeping a double set of books. The trustee saw them four or five weeks after the compromise was signed. He was astonished, and told Salomon that if he had known that circumstance he would not have made any settlement, by which I understood him to mean that he would have had nothing to do with the compromise and settlement. He was also informed of the fact by the book-keeper; and he further testified that Salomon told him that he had taken these books away and destroyed them. The fact that a quantity of goods was sent by Salomon to his father in Hamburg, of which the trustee knew nothing when the compromise was signed, and which it appears the father gave up afterwards, upon being required by the creditors to do so; that after these books were taken away and destroyed, Salomon had stock stowed away on a top loft; that he told the trustee that he had stowed it away and did not know anything of it, leaving the trustee

Smith v. Salomon.

under the impression that his object in doing so was to keep it for himself. The trustee was asked whether the stock thus stowed away had been exhibited to the creditors, and he answered that it had not, to his knowledge; and the fact that when the trustee left there was stock remaining of the value of \$5,000 or more, as well as outstanding debts, and that he had about \$2,400 in cash and \$842 in notes, amounting together to \$3,242, which amount he had then to pay as a part of the settlement notes, so that there was then, it would appear, a surplus of \$5,000, or more, in stock, together with outstanding debts, the amount or value of which is not stated.

It is difficult, in most cases, to prove fraud directly. It is generally shown by circumstances, and the circumstances here were, in my judgment, sufficient to entitle the jury to pass upon the question whether the representation of the value of the assets by Salomon to the plaintiff's firm was false and fraudulent or not. It does not appear from anything in the case that the plaintiff had rested; but, on the contrary, that the judge told the defendant's counsel that he would hear him upon a motion for a non-suit; and the motion for a non-suit which he made was upon the grounds which I have already stated; that the plaintiff could not sue on the original cause of action; that it was merged in the composition deed; that before the plaintiff could recover in an action for the balance of the debt, he would have to bring an action in equity to have the composition deed set aside, or else bring an action for damages, to which the plaintiff's counsel answered, that the only ground upon which they expected to maintain this action was that the composition deed was obtained by fraud, whereupon the court remarked that it was a question whether his remedy was for the balance of the debt, or by a bill in equity to set aside and vacate the composition for fraud, or to sue for deceit. To which the defendant's counsel responded that the action should have been upon the alleged fraud for damages or in equity, to set aside the composition deed, and that the plaintiff could not avoid the contract for the composition, or rescind that contract,

Smith v. Salomon.

without first giving up all that he had received under it. Upon which the judge then said that the plaintiff had entirely misconceived his action, and that he must dismiss the complaint.

It may be, for all that appears in the case, that the plaintiff was prepared to give further evidence respecting the fraud; that he had not rested; and it was certainly not to be expected, after the court had informed him that the complaint would be dismissed, because he had misconceived his action, that he should offer to give additional evidence respecting the fraud, or should ask to go to the jury on that question, when the judge had told him, in effect, that it would be of no avail, as he would dismiss his complaint, he having mistaken the form of his remedy.

It would, in my judgment, under these circumstances, be unjust to deny the plaintiff a new trial and affirm the judgment. I think the proper course is to grant a new trial, of which the defendants have no right to complain, as it was no part of their motion in the court below, that the complaint should be dismissed, because there was no evidence of fraud to go to the jury. They relied for their defense upon a totally different ground, and one which, I think, I have shown upon authority to have constituted no answer to the action.

LARREMORE, J., concurred.

JOSEPH F. DALY, J., dissented on the ground that there was no evidence on which the question of fraud could be submitted to the jury.

Judgment reversed and new trial ordered.

VOL. VII.—15

Plonsky v. Japha.

HENRY PLONSKY, Appellant, *against* SOLOMON E. JAPHA
et al. Respondents.

(Decided June 4th, 1877.)

The court in its discretion will refuse to allow a judgment in an equitable action affecting partnership assets in which creditors are interested, to be entered by consent of plaintiff and one of the defendants, his copartner, where another defendant, the assignee for the benefit of creditors of plaintiff's interest in the firm, does not appear to have had notice of the action, or to have appeared, and where the form of judgment consented to, names a receiver and referee, would affect creditors not before the court, and would give the plaintiff's attorney a prior lien upon the assets for costs and for counsel fees to an unknown amount.

APPEAL by the plaintiff from a judgment of this court entered upon an order dismissing the complaint on the merits, made at special term by Judge VAN HOESEN.

This action was brought by Plonsky against Japha and Meyers. The complaint alleged that Plonsky and Japha were copartners in trade; that Plonsky was insolvent and had made a general assignment of his property for the benefit of his creditors to Meyers, and that plaintiff had requested Meyers to bring an action against Japha to recover plaintiff's interest in the copartnership, but that Meyers had refused to do so. The complaint asked for a dissolution of the copartnership, an injunction, an accounting, a receiver, a sale of the assets of the firm, payment of debts, and payment of surplus to the assignee. When the cause was reached for trial neither defendant appeared.

The plaintiff on the trial gave evidence of the partnership and the assignment, and put in evidence a stipulation between the plaintiff and the defendant Japha and his attorney, that the partnership be dissolved, that Meyers be appointed receiver, that an injunction issue against Japha, that Thomas Boese be appointed referee to take the account, that the receiver, under the direction of the referee, pay plaintiff his counsel fees to be thereafter adjusted, that the

Plonsky v. Japha.

receiver then pay the creditors of the firm, and apply the surplus in accordance with the assignment. It was further stipulated that no judgment against Japha, personally, should be entered, but that judgment in accordance with the stipulation should be entered without any further notice to defendant Japha. No evidence was given that the defendant Meyers had ever refused to bring an action, or that he had ever been served with the summons, or that he had appeared.

The court dismissed the complaint on the merits.

C. Bainbridge Smith, for appellants.

ROBINSON, J.—This action appears to have been brought on for hearing before a judge at special term upon a complaint alleging a partnership between plaintiff and defendant Japha, under the style of "H. Plonsky & Co.," from September 27th, 1876, without prescribed term, but no dissolution is alleged except that plaintiff, becoming insolvent, made a general assignment of all his property and effects to the defendant, Louis Meyers, for the benefit of his creditors, who, it was alleged, had duly qualified as such, and that Meyers, though requested, had refused to institute an action for the winding up of the affairs of the firm of H. Plonsky & Co.; and plaintiff prays a decree for dissolution, an account, and for payment of any surplus of assets belonging to the firm, the payment to Meyers of the proportion belonging to plaintiff, and for a judgment against Japha for any amount due from him to plaintiff on copartnership account. An injunction and a receiver were also prayed for. Japha seems to have appeared, but Meyers, so far as appears, had not been served with process nor had appeared in the action. On the hearing a stipulation was presented by plaintiff, signed by Japha, purporting to be an agreement between plaintiff and Japha and his attorney, agreeing to the dissolution; that Louis Meyers be appointed receiver of the property of the firm; that an injunction issue as prayed for against Japha; that the plaintiff and Japha appear before Thomas Boese, as referee, for the purpose of such accounting; that the receiver, under the

Plonsky v. Japha.

direction of the referee, pay the attorney for the plaintiff, not only costs, but a counsel fee, to be thereafter adjusted; that he pay the debts of the firm and the residue of the proceeds of the copartnership assets to Meyers, for the purpose of his trust, under the assignment made to him by plaintiff; and that no personal judgment be taken against Japha, who waived notice of further proceeding. There was no proof offered of Meyers' default nor of his alleged refusal to institute an action as assignee of plaintiff, but the litigation was evidently one of a harmonious character between Plonsky and Japha, in which they were disposed as between themselves to assume complete administration of the copartnership affairs, without regard to the defendant Meyers, or any supervision or control by the court in the details of any judgment, or in the appointment of a referee and receiver, except of their own selection, and for the establishment of a prior right in the plaintiff's attorney, without appeal to the discretion of the court for an award for costs and counsel fees.

Under these circumstances, the court took exception to such a peremptory disposition of trust funds and rights of creditors, and in the absence of any proper testimony satisfactorily showing to the court that the defendant Meyers had been served with summons or had appeared or was represented, or that *he had in fact refused to intervene in his own behalf as plaintiff*, and bring an action for the administration of the copartnership affairs, the plaintiff had no standing in court, and it was properly in the discretion of the judge to dismiss the complaint. The order appealed from should be affirmed.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Order and judgment affirmed.

Allen v. Meyer.

PHOEBE B. ALLEN, Appellant, *against* OTTO MEYER, Respondent.

(Decided June 4th, 1877.)

A warrant of attachment cannot be set aside on motion, where the facts stated in the affidavit on which the warrant was granted, have a legal tendency to show that the statutory ground for the attachment exists, and are such as fairly called for the exercise of the judgment of the magistrate who granted the warrant, as to their sufficiency.

Where the affidavits on which an attachment had been granted against the property of the defendant, on the ground that he had disposed of his property with intent to defraud his creditors, showed that at a time when the defendant was largely indebted, and an execution against his property was in force and unsatisfied, and he was harassed by legal proceedings, he executed, and caused to be executed at the same time, three instruments relating to certain real estate belonging to him in another county, viz:—1. A deed from himself to one S., a laborer employed by him upon the property, for a consideration as expressed of \$2,000. 2. A deed from the said S. to his (defendant's) wife, for a like expressed consideration of \$2000; and 3. A mortgage upon the property by his wife to himself as trustee for his mother-in-law; that after those instruments had been executed, he retained them all in his own hands for about a month, and then caused them to be all recorded, two days before the recovery against him of a judgment for a deficiency in a foreclosure suit; also, that although these instruments were drawn up in the office of the defendant, who was an attorney, yet they were not prepared according to the ordinary course of business in his office, but that he attended to their preparation personally, and did not deposit them in the safe where he usually kept such papers, and that for several months after he had made the deed to S., the defendant continued to act as owner of the property, and spoke of it as his own, and gave directions about its management, and concerning repairs to and improvements upon it, etc.

Held, that these facts were sufficient to sustain the granting of the attachment within the rule above laid down.

APPEAL by the plaintiff from an order of this court, made at special term by Judge ROBINSON, vacating a warrant of attachment granted by Judge JOSEPH F. DALY.

The attachment was granted on the ground that the defendant had disposed of his property with intent to defraud his creditors. The facts are stated in the opinion.

Allen v. Meyer.

Frank R. Lawrence, for appellant.

Otto Meyer, respondent in person.

CHARLES P. DALY, Chief Justice.—The attachment could not be set aside upon motion, if there were enough in the affidavit to give the judge who granted it jurisdiction. The question is not whether his conclusion was erroneous, but whether the facts and circumstances stated in the affidavit had a legal tendency to make out the charge, and fairly call upon him for the exercise of his judgment. If they had, the attachment could not be vacated upon motion. The facts stated in the affidavit may be so slight and inconclusive, that the attachment would upon appeal be reversed, but that would not justify setting it aside as void. (*Skinnon v. Kelley*, 18 N. Y. 355; *Schoonmaker v. Spencer*, 54 id. 366; *Van Alstyne v. Erwine*, 11 id. 340 and 341; *In the Matter of Faulkner*, 4 Hill, 598; *Niles v. Vanderzee*, 14 How. Pr. 547; *Easton v. Malavazi*, ante 146.)

The affidavit, in my opinion, came fully within this rule; there was enough stated in it to give the judge jurisdiction, and if he erred in granting it, the remedy was by appeal.

Some of the circumstances set forth in the affidavit, are stated upon information and belief; but as the information upon which the belief was founded is not stated, these circumstances must be disregarded. But there were sufficient facts positively sworn to, to fairly call for an exercise of judgment. The following facts are positively sworn to:—That the defendant Otto Meyer is an attorney-at-law, doing business in this city, and that Ray, who made the principal affidavit upon which the attachment was granted, was a managing clerk in the defendant's office; that on and before the 20th of July, 1875, the defendant was insolvent and unable to pay his debts; that a judgment had been recovered against him in the Superior Court for \$1430 21, for the unpaid rent of his law office, upon which an execution had issued, which was then unsatisfied; that two judgments for the foreclosure of real estate belonging to him were recovered in this court, and that in the sale made under these

Allen v. Meyer.

judgments shortly afterwards, there was a deficiency of several thousand dollars; and that he was then owing debts to a large amount to different persons; and that other legal proceedings were pending against him; that on July 20, 1875, he prepared a conveyance for himself and his wife, of certain property belonging to him in Jamaica, Long Island, to one Steiger, who was then employed by him on this property as a laborer, which conveyance was for the nominal consideration of \$2,000; that he also prepared a deed of said property by Steiger to his (the defendant's) wife for the said nominal consideration of \$2,000; and then a mortgage from the wife to him, upon said property, as trustee for his wife's mother; that after he had prepared these several instruments, he had them executed and acknowledged, and retained them in his possession until August 25, 1875, when he had them recorded in the county clerk's office of Queen's county, which was two days before the recovery of the judgment for the deficiency in the foreclosure suits; that the manner in which these instruments were prepared by him was unusual, such business being generally done in his office by Ray, the managing clerk, who made the deposition; that Ray generally prepared such instruments in the office under the defendant's direction, and attended to the recording of them, but in this instance, Meyer prepared these instruments himself, with the aid of a copyist, and attended himself to the recording of them, and that after they were recorded, they were taken away by him from the office, and not placed in the safe in the office where such instruments were generally kept; and that finally, notwithstanding this apparent change of ownership, Meyer continued for several months thereafter to act as owner of the property, which he had so transferred to Steiger; that he spoke of it repeatedly as his property to several persons, and gave directions to several laborers and workmen, one of whom was Steiger, the grantee and grantor, respecting the management of it, and for repairs and improvements upon it, and continued preparations, which he had previously commenced, to remove from this city to the said property to reside upon it.

White v. Hoyt.

The attachment was granted upon the ground that the defendant had disposed of his property with intent to defraud his creditors, and these facts certainly had, in the language of the cases, a legal tendency to make out the charge that he had disposed of his property with such an intent.

These facts were sufficient to give the judge who granted the attachment jurisdiction, and call for the exercise of his judgment as to their sufficiency to establish *prima facie*, that the defendant had disposed of his property with such an intent. The attachment, therefore, could not be vacated upon motion, upon the ground that there was not sufficient upon the face of the affidavit to give the officer jurisdiction to grant it. See, also, *Miller v. Adams*, 52 N. Y. 409, and *Harman v. Brotherson*, 1 Den. 537.

The order setting it aside should therefore be reversed.

LARREMORE and JOSEPH F. DALY, JJ., concurred.

Order reversed.

MATTHEW WHITE, Respondent, *against* JESSE HOYT *et al.*
Appellants.

(Decided June 4th, 1877.)

Where barley was left with the plaintiff, a maltster, to be malted and stored for a contract price per bushel for the entire lot, and the person leaving the barley under such contract afterwards took away a portion of the malted barley and paid a portion of the price for malting and storage, and transferred the balance of the malted barley by indorsing over the maltster's receipts therefor to a third person who had notice from the receipts that the charges for malting and storage were as "per agreement," and the balance of the barley malted was delivered by the maltster to the third person, upon his promise to pay "the charges:" *Held*,—that the plaintiff had a general lien on the malted barley for the unpaid balance of the original contract price for storage and malting, and could recover the amount of that lien of the person to whom the balance of malted barley was delivered.

White v. Hoyt.

In such a case it is immaterial upon the question of the right to recover such balance of charges, whether or not the plaintiff knew before delivering the balance of the malted barley, that such balance had been transferred to third parties by the person who had left the same to be malted.

APPEAL by the defendant from a judgment of the court, entered upon a verdict in favor of the plaintiff, rendered at a trial before Judge VAN HOESEN and a jury, and from an order denying a motion for a new trial.

The action was brought by White, a maltster, to recover \$975 89, a balance of charges for malting barley, for which charges a quantity of the malt belonging to defendants had been held by plaintiff, and which charges it was alleged in the complaint the defendants had promised to pay in consideration of the malt being delivered to them. The complaint admitted that defendants had paid \$2,500 subsequent to the delivery of the malt.

The defendants, in their answer, alleged that the only charges on the malt held by plaintiff for defendants amounted to \$2,459 79, and that by mistake they had paid plaintiff \$40 21 too much. This last sum and the further sum of \$115 86, for alleged failure to deliver some seventy-two bushels of malt, defendants counterclaimed of plaintiff. The answer further alleged that the promise made by the defendants to pay charges was a promise to pay the charges for malting the particular barley from which the malt so held for them was obtained. It appeared from the evidence that the malt referred to in the complaint was a part of a lot of 18,949 bushels sent in the form of barley by John Gordon & Son to the plaintiff in October and November, 1872, under an agreement between Gordon & Son and plaintiff that it should be malted by plaintiff at twenty-three cents a bushel, plaintiff making but a single agreement for the malting of the whole lot. It also appeared that the charges for malting this amount (18,949 bushels), at twenty-three cents a bushel, were \$4,358 36, and of that amount Gordon & Son paid plaintiff \$1,000 on account, leaving a balance of \$3,358 36 unpaid. On November 18th, 1872, Gordon & Son, upon advances made them by defendants, transferred a part of the

White v. Hoyt.

barley, by indorsing over to them two maltster's receipts signed by plaintiff.

These receipts each contained a clause, that the charges upon the barley, for labor and storage, were as per agreement. The first receipt was dated Oct. 11, 1872, and was for 4,924 8-48 bushels of barley, and the second, dated November 9, 1872, was for 5,410 bushels Western barley. Other consignments of barley, besides the two lots for which the receipts were given, made up the 18,949 bushels sent by Gordon & Son to be malted under their contract with the plaintiffs. The lots not mentioned in the receipts (8,615.12 bushels) were, after being malted, delivered on Gordon's order from December 2, 1872, to April 25, 1873, in all 8,861.32 bushels of malt. Gordon paid \$1,000 on account, and in May told the plaintiff, that he had transferred the balance of the malt to defendants, who (he said) would pay the balance of the bill.

When the defendants applied to plaintiff for the delivery of the malt for which they held the receipts, the plaintiff declined to deliver it unless he was paid "the charges for the barley." Upon the defendants replying, "of course we consider ourselves bound for the payment of the charges on this malt," the delivery was made.

John A. Mapes, for appellant.

Frank D. Harmon, for respondent.

ROBINSON, J.—There is no conflict in the testimony as to the fact proven by the plaintiff, that all the barley received by him from Gordon & Son, to be stored and malted, was under an entire contract made in October, 1872, for the malt-ing of 20,000 bushels of barley at twenty-three cents per bushel, and that under that agreement about 19,000 bushels were delivered and malted, the proper charge for which was \$4,358 36, of which Gordon & Son paid but \$1000 on account; that the malt came in three different parcels, which, except some 10,335 bushels represented by two receipts of plaintiff, had been delivered Gordon & Son. These receipts

White v. Hoyt.

were in no sense "Warehouse receipts," under the General Warehouse Act, as the storage contemplated was for the purpose of converting the barley into malt. In May, 1873, Gordon informed plaintiff he was about to fail, and had transferred the grain to defendants, and that they would pay the balance of his bill. The barley was received by plaintiff in four or five different lots, for two of which, representing some 10,334 bushels of barley, defendants held the plaintiff's receipts, deliverable to the order of and indorsed by Gordon & Son, acknowledging the receipt of such barley on storage "to be manufactured into malt, and the product thereof" delivered to the order of Gordon & Son "on payment of the charges accrued thereon, in accordance with marginal note hereto," which was "storage and labor as per agreement per month." All of the barley (malted) that had been delivered plaintiff under the original agreement had been returned to Gordon & Son, except the quantities represented by these receipts, and they had paid the plaintiff but \$1,000 on account.

Under such circumstances the plaintiff had a general lien upon all the barley thus received and malted by him for the amount agreed to be paid him for storage and labor in the process of malting the whole quantity, and for this he should recover unless he has agreed to a severance of his lien and agreed to look to the particular lots represented by the receipts held by defendants only for the amount for which they should alone be chargeable at the price, *pro rata*, per bushel agreed upon for storage and labor in malting the whole quantity.

It cannot be discovered from any evidence offered in the case that any such idea of severance of plaintiff's lien, or the confining of his claim to such lien under the entire contract proved, should be confined to the barley or its malted products represented by the receipts held by the defendants, for any *aliquot* part of the price agreed to be paid for the storing and malting of the whole quantity delivered plaintiff under the original agreement with Gordon & Son, or that any idea of that character was ever suggested by the defendants until after they had obtained possession of all of the

White v. Hoyt.

malt. On the contrary, the defendants appear to have acted at least in disregard of any prudential caution (if any of their rights depended upon it) in ascertaining what was the special agreement referred to in the receipts as to the storage, labor, etc., contemplated in the contract for the storage and malting of the barley. They went through the unnecessary formality of procuring a clerk of plaintiff to indorse on these receipts the words "not transferable," under some impression that although the barley was stored to be malted, they were subject to the provisions of the General Warehouse Act. In the latter part of May, or early in June, 1873, on inquiry by an agent sent for that purpose, they were informed that the malt would not be delivered on mere payment of the specific charge for malting the barley called for by the two receipts they held, but for the balance of \$3,358 36 due from Gordon & Son. Without further discussion as to the propriety or particulars of this charge, they, on subsequently asking the delivery of the malt represented by exhibit No. 1, wrote, requesting a delivery, saying, "of course we consider ourselves bound for the payment of the charges on the malt." To this plaintiff replied, "I would like to have the storage-house receipt returned, and to know if you guarantee the claim I have against the malt." To this they did not object, but received the delivery of the whole June 28th and 30th, and July 4th. On July 6th, plaintiff again presented his bill for the said balance of \$3,358 36, on which defendants paid \$2,500 on account, stating they had not had time to examine the account; but on a subsequent occasion they claimed they were liable only for the specific charges of twenty-three cents per bushel for the storage and labor of malting the quantities represented by their receipts.

The claim was untenable. The barley represented by their receipt was delivered plaintiff to be malted under an entire contract with Gordon & Son, and was subject to the lien of plaintiff for what was done in that respect to the entire lot. On taking a transfer from Gordon & Son of the receipt for these two lots or parcels, they were apprised the barley in its storage and manufacture into malt was subject

White v. Hoyt.

to a *special agreement*, and whether so apprised or not, they took only such title as Gordon & Son had, and subject to all liens upon it enforceable as against them. So also before taking possession of the goods they were apprised of plaintiff's claim of \$3,358 36, and without questioning it wrote "they considered themselves bound to pay the charges on the malt." Upon a bill presented therefor, after the delivery, they paid \$2,500, and only asked delay to examine it without suggestion or question as to the general claim distinctly presented by plaintiff throughout, and never questioned, in the particular now sought to be asserted, to wit, that the malt delivered them was only subject to a specific charge, and they only responsible on their promise (on which the malt was delivered) to pay a specific charge of twenty-three cents per bushel for storing and malting the amount of barley represented by the receipts which they held, without regard to the claim of plaintiff thereon, for the balance due for malting the entire quantity delivered him by Gordon & Son for that purpose under the original agreement. Plaintiff's right of recovery and the inefficiency of any of defendant's objections appear clear to me. I am, therefore, for affirming the judgment.

CHARLES P. DALY, Ch. J., concurred.

LARREMORE, J., dissented.

Judgment affirmed.*

* This decision was affirmed by the Court of Appeals May 21st, 1878.

Phoenix v. Dupuy.

JOHN W. PHOENIX, Respondent, *against* CHARLES DUPUY,
Appellant.

[TWO CASES.]

(Decided June 4th, 1877.)

The right of a party under § 391 of the (old) Code of Procedure to examine his adversary before trial, is not absolute, and such an examination will not be allowed in a case where, by the established rule before the Code, a bill for a discovery would not have been sustained in equity.*

The rule in equity was, that a party could not be compelled to discover any matter which might subject him to a penalty, a forfeiture, or a criminal prosecution, and accordingly *held* that a defendant could not, under § 391 of the (old) Code of Procedure, be examined as to whether he had published an alleged libel against the plaintiff.

The practice in equity as to bills of discovery and the various constructions placed upon § 391 of the Code reviewed. Per Charles P. Daly, Chief Justice.

APPEAL by the defendant from an order of this court made at special term by Judge LARREMORE, denying a motion made by the defendant, Dupuy, to vacate an order and summons for his examination before trial, and from the order for examination. The action was brought to recover damages for libels. After issue joined, the plaintiff obtained an order for the examination of the defendant before trial, upon an affidavit which states the purpose of the examination derived as follows:

“Upon such examination I shall endeavor to disclose that the letters set forth in said complaint were published by said defendant; and in malice; were received by the parties to whom they were addressed; and that in consequence said plaintiff has been injured as alleged in said complaint; and furthermore the same is necessary to enable this plaintiff to successfully prosecute his suit, inasmuch as all the same said facts are not admitted in said answer.”

* See § 870, *et seq.* of new Code of Civil Procedure.

Geo. W. Van Siclen, for appellant.

Charles Meyer, for respondent. The testimony sought to be obtained from the defendant is perfectly proper in itself. If there be an objection to it, that it would tend to criminate the witness, that is a personal privilege to him which he can exercise, *and he alone*, and *when examined*, not before. And it must be claimed under oath. (*Parry v. Almond*, 12 Serg. & Rawle, 284; *U. S. v. Burr*, 1 Robertson's Trials, 207, 208, 242 to 245.) Under the old practice the interrogatories were substantially proposed by the *bill* of discovery, and the objections were properly entered to the interrogatories (i. e. issue joined upon the bill) then; but under § 391 of the Code, these objections could not be interposed upon the granting of the order of examination, inasmuch as no interrogatories are then proposed.

CHARLES P. DALY, Chief Justice.—The examination of an adverse party before trial, provided for by the § 391 of the Code, is a substitute for the former remedy by bill of discovery, which was abolished by this chapter of the Code, and may be had where a bill for a discovery would previously have been sustained. (*Carr v. Great W. Ins. Co.*, 3 Daly, 160; *King v. Leighton*, 58 N. Y. 383; *Glenney v. Stedwell* [Court of Appeals], 1 Abb. N. C. 327, and note 332; *Wiggin v. Gans*, 4 Sandf. 647.)

This remedy was formerly the only way in which proof of a fact exclusively within the knowledge of one of the parties could be obtained, because parties, in actions at law, could not then, as they can now, be called as witnesses upon the trial. It was, moreover, the only effectual mode of getting at a knowledge of the contents of documents which were in the possession of the other party, and of proving what they contained; for the relief which courts of law could afford was limited and attended with many difficulties before the statute was enacted, for compelling the production and inspection of books and papers, by a motion before trial.

The statutory provision allowing parties to be examined as witnesses, either on their own behalf or by the adverse party, and of compelling, by motion, the inspection of books and papers, have to a great degree dispensed with the necessity of this discovery of evidence before trial, although the right to it remains the same as before. In view of the abuses that would arise if a party, either before any action was brought, or before he had stated his cause of action in a pleading, or after an answer had been served, were allowed, without any restriction or limitation, to subject the other party to an inquisitorial investigation under oath, to ascertain whether he could make out a cause of action, or whether his adversary could probably succeed in establishing a defense, courts of equity, at an early period, imposed limits to such investigations, by requiring that it should appear by the bill, that the matter sought to be discovered was essential to the establishment of a cause of action or of a defense.

"A system of judicial inquiry," says Mr. Hare, "would be obviously defective, which had no means of obtaining and compelling a production of evidence from the parties themselves, whilst a system which should set no bounds to the power of scrutiny would be fertile in expedients of oppression," and in respect to the rules and principles by which courts of equity were guided in allowing or refusing such discoveries, he further remarks, "They are the result of that scrupulous care with which a long succession of eminent judges have asserted the power of judicial investigation without sacrificing the security and secrecy which all are entitled to claim and to preserve. They define and reconcile the rights of individual privacy and the demands of public justice. They express the extent of the privilege," whilst the limits they impose are "identified with the administration of justice and depend upon principles which are perpetual." (Hare on Discovery, XI, XII, XIII.)

Bills for the discovery of evidence, being, however, expensive and dilatory, were so seldom resorted to, after the inspection of documents could be compelled by motion, and

especially after parties could in all cases be examined as witnesses, that the object of this provision in the Code, abolishing such bills and substituting in their stead the simple and inexpensive procedure provided for by the § 391, was not understood. By many it was interpreted literally, as giving the right to examine the party before trial without any restriction or limitation whatever; wholly overlooking the history of this branch of jurisprudence, and the abuses, injustice and oppression that could be practised if that were permitted. Judge I. L. Mason, it is true, shortly after its enactment, declared, in *Wiggin v. Gans* (4 Sandf. 647), that this provision was a substitute for bills of discovery and nothing else; "that the examination referred to in it, meant upon every fair principle of interpretation, any examination for the purpose of discovery, in which formerly a bill of discovery would have been resorted to;" and that "wherever a bill of discovery could have been filed under the former practice in support or defense of an action, there the party might be examined in the mode presented in this chapter, and in no other mode." But this interpretation was not followed; and it was held in subsequent cases, as it had been previously held, that upon a simple notice of five days, given by the opposite party, except the judge should by order fix a different time, a party was compelled before the trial to appear before the judge, at the time and place specified, and be examined under oath as a witness. (*Taggard v. Gardner*, 2 Sandf. 669; *Green v. Wood*, 15 How. Pr. 342; *Cook v. Bidwell*, 29 id. 483.)

In *Garrison v. The Mariposa Co.* (N. Y. Com. Pleas, Sp. T. 1868), I declined to follow these cases, and held, as Judge Mason had held, that it was simply a substitute for the former remedy by bill of discovery; that it was consequently subject to the rules and principles that courts of equity had applied to prevent abuse, oppression, or injustice, and could not be had without an affidavit, showing that the discovery sought was of some matter material to the establishment of a cause of action or a defense; so that the party could know exactly what he was called upon to discover, that he might,

Phoenix v. Dupuy.

as in a bill of discovery, object to it as immaterial or improper, or if willing to do so, admit it; or if he were examined, that the judge might confine the investigation within the limits of the discovery sought; and see *Carr v. G. W. Ins. Co.*, 3 Daly, 160.

The effect of holding that this examination of a party before trial was an absolute right, without any qualification or restriction, soon became apparent where the party summoned his adversary to be examined in this way, before any complaint was filed, and where the judge had nothing before him to indicate what the examination was to be about, and was left wholly without guide as to its extent, range or purpose. In view of this difficulty, and of the consequences to which it would lead, it was held in a large number of cases, from *Chichester v. Livingston* (3 Sandf. 718) to *Norton v. Abbott* (28 How. Pr. 388), that this examination could not be had at all until after issue joined. But this did not suffice. In later cases, this construction, for which there never was any foundation, was not adhered to, and it was held that the examination might be had either before or after issue joined (*McVickar v. Ketchum*, 1 Abb. N. S. 452; *Bell v. Richmond*, 50 Barb. 571); and to meet, under this interpretation, the difficulty before suggested, it was held, first by Barbour, J., in *Greene v. Herder* (7 Robt. 455), that if the application is made before the service of a complaint, it must be upon an affidavit stating:—(1) if made by the plaintiff, the nature of the action and demand; (2) if made by the defendant, the nature of his defence; (3) the name and residence of the witness; and afterwards, by Jones, J., in *Duffy v. Lynch* (36 How. Pr. 509), that it must be upon an affidavit setting forth with particularity the facts and circumstances out of which the plaintiff supposes the cause of action to have arisen, the relief he supposes he is entitled to, the defense he anticipates, and the subjects upon which he desires to interrogate the other party; and this conflict of decisions led to the adoption, by the convention of judges, in 1870, of the 21st rule, the requirements of which were, in effect, to construe the § 391. as providing for the kind of discovery by the examination of

a party before trial, which was formerly obtained by a bill in equity, and so far as it is applicable, the practice which prevailed in equity is necessarily the guide as to the extent and nature of the discovery to which the party is entitled by such an examination.

I have entered thus at length into an examination of this subject, and of the contrariety of views and the confusion that has prevailed respecting the object of this section, for the reason that even now scarcely a week passes in this court without an application being made for the examination of a party under it, without anything being presented but an order for his examination at a specified time and place; so difficult has it been to impress upon practitioners that they have not the right to bring a party up in this way before trial, and require him to answer under oath any questions that they think proper to put to him.

In equity, a party was allowed to discover from his adversary any matter which was material to the establishment of his cause of action or of his defense, although he might have other witnesses to prove it, as the admission of the matter would dispense with the necessity of calling the witnesses; and it was no answer to the application that the other party might be examined as a witness on the trial, for the one filing the bill was not bound to call him as a witness on the trial, but might have a discovery previously from him as a party. (*Plummer v. May*, 1 Ves. Sr. 426; *Montague v. Dudman*, 2 id. 398; *Finch v. Finch*, id. 492; *Tooth v. Dean of Canterbury*, 3 Sim. 49; *March v. Davison*, 9 Paige, 601; Story's Eq. Pleadings, § 119 and note; Wigram on Discovery, 2, 4; Hare on Discovery, 1, 110, 116, 187.) And that this was what was meant by the codifiers in framing this section, appears from their referring in their report to "the great benefits to be expected by the relief it would afford to the rest of the community by exempting them from attending as witnesses to prove facts which the parties respectively know and ought never to dispute." (First Report of Coms., pp. 244, 245.) That the party from whom the discovery was sought might be protected, the one filing the bill was

Phoenix v. Dupuy.

obliged to show, not only that the matter sought to be discovered was material, but how it was material (*McIntyre v. Mancius*, 3 Johns. C. R. 47; *id.* in error, 16 Johns. 592; *Kimberly v. Sells*, 3 Johns. C. R. 467; *Lane v. Stebbins*, 9 Paige, 624, 625); and, as a further protection, a discovery was not allowed as to certain matter to which I shall have occasion to recur.

The affidavits on which the orders for the defendant's examination in these two cases, before trial, were granted, state that the plaintiff will endeavor, upon such examination, to disclose that the letters which constitute the libel for which the actions are brought were published by the defendant; that they were published in malice; that they were received by the parties to whom they were addressed, and that in consequence the plaintiff was injured.

The letters being libellous, the law would imply that there was malice, and that the plaintiff was injured by their publication; and as no fact is stated in the affidavit showing a tendency to show actual malice, or special damage, the discovery sought is reduced to the inquiry whether the defendant published the letters, and to whom he sent them. The discovery which the plaintiff seeks is to compel the defendant to disclose whether he has published a libel, or, in other words, whether he has been guilty of a criminal offense for which he could be indicted and punished.

In the restriction imposed upon this right of discovery, nothing was better settled than that a party could not be compelled to discover any matter which might subject him to a penalty, a forfeiture, or a criminal prosecution. (Hare on Discovery, part III. c. 1, § 1; Wigram on Discovery, p. 60, §§ 83 to 94.) "A plaintiff," says Mr. Wigram, "whatever the merit of his case may be, is not entitled to a discovery from the defendant of any matter which would criminate him or tend to do so." (Wigram on Discovery, p. 195.) Lord Eldon, in *Paxton v. Douglas* (19 Ves. 226), went even farther, saying: "The strong inclination of my mind is to protect the party against answering any question, not only that has a direct tendency to criminate him, but that forms *one step to*

West v. Lynch.

wards it." In *Baily v. Dean* (5 Barb. 303), Judge Pratt was of opinion that a defendant could not be compelled to disclose facts to enable a plaintiff to sustain an action of slander, because in such actions, punitory damages may be given; and in *Brownsword v. Edwards* (2 Ves. Sr. 246), Lord Hardwicke said, that the court would not force the party by his own oath to subject himself to punishment for usury. And see *March v. Davison* (9 Paige, 585); *Taylor v. Bruen* (2 Barb. Ch. 301); *In the Matter of Tappan* (36 How. Pr. 394); *The People v. Mather* (4 Wend. 254); *In the Matter of Kip* (1 Paige, 607).

It is apparent upon the face of the affidavits that the plaintiff had no right to the discovery sought, and both orders should therefore be vacated.

LARREMORE, J., concurred.

Ordered accordingly.

GEO. P. WEST, Respondent, *against* THERESA LYNCH,
Appellant.

(Decided June 4th, 1877.)

For the purpose of discrediting a witness, it is not competent to put in evidence an indictment or sworn charges made before a magistrate against him, where he is not shown to have been convicted thereon. A record of conviction would be admissible for that purpose, but not a mere complaint or an indictment.

APPEAL by the defendant from a judgment of the general term of the Marine Court, of the city of New York, affirming a judgment of that court, entered on the verdict of a jury.

The action was brought to recover compensation for services as a broker.

The facts essential to an understanding of the decision here appear in the opinions.

West v. Lynch.

William G. Bussey, for appellant.

H. M. Whitehead, for respondent.

BY THE COURT.*—The defendant, Theresa Lynch, was asked upon cross-examination whether she was the person named in an indictment, and in certain written charges which were placed in her hand. She answered that she did not know. She was asked if that was her name which appeared in the indictment and in the charges. She answered that her name was Theresa Lynch. The indictment and the charges which had been shown the witness were then offered in evidence by the plaintiff, and notwithstanding the objections of defendant's counsel, admitted by the court. It was not contended that any conviction had been had upon these charges and the indictment.

We think the charges and the indictment ought not to have been received in evidence. Whilst there is no doubt that a record of conviction is admissible to impeach the credit of a witness (*Carpenter v. Nixon*, 5 Hill, 260; *Newcomb v. Griswold*, 24 N. Y. 300), a mere complaint or an indictment is not admissible. It does not impeach the witness (*People v. Gay*, 7 N. Y. 378; *Lipe v. Eisenlerd*, 32 N. Y. 238; *Jackson v. Osborn*, 2 Wend. 555). Until convicted, the law presumes the person indicted to be innocent of the charge. It is very certain that the jury were influenced to the prejudice of the defendant, by the introduction of the indictment and the charges against her. She is entitled to a trial before a jury whose minds are not affected by evidence so irrelevant, and yet so prejudicial to her cause. The fact that no ground of objection was stated on the trial when this evidence was offered and objected to, does not prevent our examination of the correctness of the ruling by which it was admitted, since no ground could be stated which would furnish the party offering the record with any information enabling him to supply any further proof calculated to make the evidence relevant, competent, or material.

* Present, JOSEPH F. DALY and VAN HOESEN, JJ.

West v. Lynch.

Judgment reversed, new trial ordered, costs to abide event.

Subsequently a motion for a reargument was made on behalf of the plaintiff, and the following opinion was delivered June 4th, 1877.

CHARLES P. DALY, Chief Justice.—This is not, under the rule, a case in which a motion for a reargument can be made. (*Curley v. Tomlinson*, 5 Daly, 283; *Mount v. Mitchell*, 32 N. Y. 702.) There is nothing to warrant the conclusion, that a question decisive of the case, and duly submitted, has been overlooked.

The point relied upon was printed in the respondent's points. It does not follow, because it is not referred to in the opinion, that it was overlooked, or if it had been, it was in no way decisive of the case. The court reversed the judgment upon the ground that the plaintiff, under the defendant's exception, was allowed to give this indictment and the proof upon which it was found in evidence. It was in the discretion of the judge to allow or exclude questions put to the witness upon collateral matters, for the purpose of impairing her credit, and his decision in either allowing or disallowing them is not subject to review, except in cases of manifest injustice. (*Great W. T. Co. v. Loomis*, 32 N. Y. 127; *La Beau v. The People*, 34 id. 223.) The judge left it to her to answer or not, whether she had ever been charged with and arrested for receiving stolen goods, but said that he would not permit any contradiction of her. She elected to answer, and her answer was, that she had bought some things from a lady, recommended to her by the proprietor of the New York Hotel, which she found out belonged to a lawyer, to whom she gave them, and with whom she went to Jefferson Market Police Office. The question was asked whether she had been arrested, to which she answered, "I don't know;" and upon her being asked further, whether she had been detained at the police office, she answered "No." Written charges were then presented to her, and she was

West v. Lynch.

asked whether she had been arrested upon these charges. Her reply was, "I don't know anything about them." The indictment subsequently given in evidence was then shown to her, and she was asked whether she was the person named in it. Her answer was "I don't know, I am sure," it appearing by a further answer that she could not read very well. The court then said, "That is your name?" she answered, "My name is Theresa Lynch."

Question by the court.—"Is that Theresa Lynch?"

Answer.—John Lynch.

Question.—"Theresa Lynch also, is it not?" To which the defendant's counsel answered, "Yes, there is Theresa Lynch also on it." Upon this the plaintiff's counsel offered the indictment and the written charges in evidence, to which the defendant's counsel objected. The court admitted them, and the defendant excepted.

There was nothing in the plaintiff's examination that justified giving the indictment and written charges in evidence. She had not admitted in her examination that she had either been charged with, or arrested, or indicted for receiving stolen goods, and yet the plaintiff was allowed to give in evidence the indictment of herself and her husband by the grand jury, and the affidavits upon which the indictment was founded. In no sense can the indictment, and the evidence upon which it was founded, be regarded as evidence given voluntarily by the witness. On the contrary, she, through her counsel, objected to it, and it was error to receive it under the objection and exception; for we cannot say that it could have no effect upon the minds of the jury, especially as in one of the affidavits it is stated that the defendant's husband purchased some of the property from the woman who stole it, knowing it to be stolen property. The court put its opinion upon the ground that it was error to receive this evidence, and that the judge did not refer in his opinion to the defendant's point, that the witness voluntarily admitted the complaint, and the indictment shown to her, was, no doubt, because such was not the fact; she neither admitted that she had been indicted, nor arrested at any time,

Belknap v. Sickles.

swearing positively that she knew nothing of the indictment, which may have been entirely true; for all that appeared, when the papers were received, was that she had been examined at the police office, and said that she was not guilty of the charge preferred against her, and that a *nolle prosequi* had been entered with the leave of the court, and the consent of the district attorney. There is no foundation for a re-argument upon the ground that the court overlooked a question submitted to it, which was decisive of the case, and the application must be denied.

ROBINSON and LARREMORE, JJ., concurred.

Motion denied.

CLAYTON BELKNAP, Respondent, *against* DANIEL E. SICKLES,
Appellant.

(Decided June 4th, 1877.)

Under § 100 of the (old) Code of Procedure, as amended in 1851 (and before the amendment of 1867), both departure from and residence out of the State were necessary to suspend the running of the statutes of limitations.

The amendment of 1867 (L. 1867, c. 781) creating an additional exception, where a party should remain continuously absent from the State for one year or more, was not retrospective, and did not operate to revive claims which, under the statute as it stood previous thereto, were then already barred.

Where, therefore, a complaint, anticipating the defense of the statute of limitations, alleged the defendant's departure from and residence out of this State for certain years prior to 1867, and the defendant answered that during those years he had resided in this State, and had not been absent from it except for limited periods; *Held*, that the defendant should not be compelled to make his answer more definite and certain by stating the time of such absences and for what periods they continued.

APPEAL by the defendant from an order of this court, made at special term by Judge JOSEPH F. DALY, granting a motion

Belknap v. Sickles.

that the defendant make his answer more definite and certain.

The complaint, after alleging loans of money to the defendant made in 1861, alleged that "thereafter, and until the 1st day of July, 1869, the defendant departed from and resided out of the State of New York and the jurisdiction of the courts of this State, not less than five years, taking said absences collectively. That from the 1st day of July, 1869, to the time of the commencement of this action, said defendant, Sickles, departed from and remained continuously absent from this State, for the space of one year or more at a time; said absences taken together aggregating six years or more."

That said Sickles was, up to about July 1st, 1869, in active service in the United States army, and spent most of his time in Washington and in the Southern States, and after the 1st of July, 1869, was United States Minister to the Court of Madrid, or resided in England or France, or some, where on the continent, except two short visits to this country."

The answer of the defendant denied the allegations of the complaint except "as admitted, avoided, modified or explained," and set up as a defense that the causes of action did not accrue within six years next before the commencement of the action; the answer further alleged as follows, viz.: "Fourth: that he, the said defendant, is a native born citizen and resident of the city of New York, and since the alleged advances by the said A. A. Belknap, and the supposed promises and undertakings in the said complaint mentioned, has continually and uninterruptedly been a citizen and resident of the city and State of New York, and has never been absent from the said State, except for limited periods, and then only in the public service."

The order required the defendant to make the fourth subdivision of his answer more definite and certain, by stating the time of his absences from the State of New York, from July 1st, 1861, to December 1st, 1876, and for what periods they continued.

Belknap v. Sickles.

Elias J. Beach, for appellant.

Lewis Sanders, for respondent.

ROBINSON, J.—This action was brought in the latter part of December, 1876, or beginning of 1877, upon three several claims for money alleged to have been loaned the defendant in June and July, 1871, by one A. A. Belknap, and “repayable immediately,” of which plaintiff alleges he is assignee. With a view to forestall the defense of the statute of limitation, plaintiff alleges that after the causes of action had accrued, the defendant thereafter, and until the 1st day of July, 1869, departed from and resided out of the State of New York and the jurisdiction of the courts of this State not less than five years, taking such absences collectively; that from the first day of July, 1869, to the time of the commencement of the action, the defendant departed from and remained continuously absent from the State for the space of one year or more at a time, said absences taken together aggregating six years or more; that up to about July 1st, 1869, he was in active service in the army of the United States, and spent most of his time in Washington and in the Southern States, and after the first of July, 1869, was United States Minister to the Court of Madrid, or resided in England or France, or somewhere on the continent, except two short visits to this country.

The defendant, in the fourth subdivision of his answer, asserts he has, since the alleged advance of money by said Belknap, continually and uninterruptedly been a citizen and resident of the city and State of New York, and has never been absent from the said State except for limited periods, and then only in the public service.

The order appealed from requires him to “make the fourth subdivision of his answer more definite and certain, by stating the time of his absences from the State of New York from July 1st, 1869, to December 1st, 1876, and for what periods they continued.”

This is erroneous. The causes of action, as stated severally, accrued on or prior to July 10, 1861, under the provisions of

Belknap v. Sickles.

the Code as it then existed by the amendment of 1851. The requirement that an action in contract should be brought within six years after the right accrued was qualified by the 100th section, that if the debtor "shall depart from and reside out of the State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of the action." Both departure *and* residence out of the State were necessary to satisfy this exception. (*Hickok v. Bliss*, 34 Barb. 321; *Wheeler v. Webster*, 1 E. D. Smith, 1.) And the amendment to said § 100 in 1867 (L. 1867, ch. 781, p. 1921) creating an additional exception, where a party defendant should remain "continuously absent therefrom for the space of one year or more," had no retroactive effect upon those causes of action which, under existing laws, would all have (except for departure from and residence out of the State) expired on the 11th of July, 1867. The amendment of 1867 indicated no intention that such mere absences from the State of "one year or more," should apply to causes of action that had previously accrued. (*Stone v. Flower*, 47 N. Y. 566.) But the complaint making averments of a departure and residence out of the State prior to July 1st, 1869, "of not less than five years," left the claim as asserted only liable to such continuous absences from the State for the space of "one year or more," occurring during succeeding years, so that the further period of five years necessary to satisfy the exception to the statute of limitation had not transpired. To render such exception to the operation of the statute available after July 1st, 1869, after which such absences are alleged to have occurred, it should further be made to appear that they were continuous "for the space of one year or more." The aggregate of *such successive absences* may be deducted from the time in which the statute runs. (*Cole v. Jessup*, 10 N. Y. 96.)

In view of these considerations, the order appealed from was improvident in requiring, first, any statement of the times of defendant's absences from the State from the 1st of July, 1861, to July 1st, 1869, during which period it was alleged he had departed from *and* resided out of the jurisdiction of

Belknap v. Sickles.

the court, since an answer of mere *absences* from the State during any part of that period was wholly irrelevant and irresponsible; second, any statement of any absences from this State for any subsequent period, or for any such subsequent period whatever, which were not continuous "for the space of one year or more" at a time; third, the allegations of the complaint were denied, except as thereafter "*admitted and avoided, modified or explained.*" His allegation is that he has continuously and uninterruptedly been a citizen and resident of the State, and that his absences have been for limited periods, and in the public service. As matter of pleading, whatever is alleged and is not controverted or denied by answer or reply, is to be taken as true (Code, § 168). The allegation as to continuous absences from the State after July 1st, 1869, for one year or more at a time, aggregating six years or more, which is denied, as qualified by the assertion that he (defendant) has never been absent from the State except for limited periods, and only in the public service, may well, from its indefiniteness, be deemed a matter which the court may require to be made more definite and certain. The question is not as to what may have been his public office or the character of his absence, for notwithstanding his having been a citizen and resident of the State, if he has been *continuously absent* from the State for one year or more at any one time, such absence is not to be taken into account in the computation of time running from the accruing of the debt. The utmost, therefore, that was within the province of the judge granting the order was, to direct the defendant, as matter of pleading, definitely and certainly to state, in response to the allegations of the complaint, "at what times, since July 1st, 1869, he had been for any one time continuously absent from the State for one year or more." The order appealed from, except as thus modified and limited, is reversed without costs, except as to disbursements, which are to abide the event.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Ordered accordingly.

Schwarzansky v. Averill.

AUGUSTA SCHWARZANSKY, Respondent, *against* HORATIO F.
AVERILL *et al.*, Appellants.

(Decided June 4th, 1877.)

A person who indorses a note before its delivery to the payee, with the intention of becoming surety for the payment of the note, is liable to the payee, who has advanced money or property, or given credit on the faith of such security, for the amount of the note, although the indorsement was without consideration.

It seems, that an allegation in the complaint, that the indorsement was made "for the purpose of obtaining credit" for the maker with the payee, is a sufficient allegation of intention on the part of the indorser to become a surety for the maker of the note.

Knowledge on the part of the indorser that the maker intended to obtain credit with the payee by means of the indorsement, is not to be inferred from the fact that the indorser signed before the payee.

Where, at the time of indorsement, the indorser (defendant) was informed by the maker that he had an arrangement with the payee (plaintiff), by which he could get certain stock if the defendant would indorse the note, and where such note was used to take up another note held by the plaintiff, on which the defendant was liable only as an accommodation indorser. *Held*, sufficient evidence to show that the defendant indorsed the note as surety for the maker.

APPEAL from a judgment of the Marine Court, entered upon a decision of the general term of that court, affirming a judgment entered upon a verdict for the plaintiff, rendered at a trial had at a term of that court.

The action was brought against Simon Van Winkle as maker, and H. Tracy Arnold and Horatio F. Averill as indorsers, to recover the sum of \$1,200 and interest, the amount of a promissory note made to the order of the plaintiff.

It appeared from the evidence at the trial, that the note in suit had been given, together with a check of Averill's for \$300, in part payment of a former note of \$1,500 made to the plaintiff by Van Winkle, and indorsed by Arnold and Averill; that Van Winkle had given plaintiff the \$1,500 note in settlement of certain claims against him and other parties. This settlement also provided for the delivery to Van Winkle,

Schwarzansky v. Averill.

in certain contingencies, of certain stock of the American Life Saving Suit Company. It appeared also that Van Winkle had obtained the indorsements of Arnold and Averill under an agreement that they were to share in certain stock of the Life Saving Suit Company, which he (Van Winkle) was to obtain by means of the note. There was evidence that the note in suit was indorsed by Averill before being received by plaintiff, and that plaintiff took the \$1,500 note on the settlement, and received the \$1,200 note in part payment of the former note, relying upon the indorsements.

The judge at trial, in charging the jury, left to them the question of fact as to whether Averill knew, at the time he indorsed the \$1,500 note, that it was to be given by Van Winkle to plaintiff, in accordance with the terms of the contract between those two persons, and whether he knew that the \$1,200 note was to be given in renewal of the \$1,500 one, and as to whether he indorsed the \$1,200 note with the intention that it should represent, in the hands of the plaintiff, a valid claim against him.

The jury found a verdict for the plaintiff for the amount of the note and interest.

W. T. B. Milliken, for appellant.

Otto Horwitz, for respondent.

LARREMORE, J.—On May 3, 1875, Simon Van Winkle made an agreement with the plaintiff for the settlement of certain claims held by her against the American Life Saving Suit Company. As part of the consideration of such settlement, he gave and she accepted his note to her order for \$1,500, indorsed by the defendants Averill and Arnold. This note, at maturity, was protested, and on July 9, 1875, Averill paid \$300 on account, and the note in suit was given for \$1,200, drawn in like manner as the previous note, payment of which was resisted by the defendants, on the ground that as between themselves and the plaintiff no liability existed. Arnold had a non-suit at the trial, but the jury gave

a verdict against Averill, which he claims is not sustained by the evidence.

The liability of the indorser of a note before its delivery to the payee is well settled by the highest authority. (*Moore v. Cross*, 19 N. Y. 227; *Bacon v. Burnham*, 37 id. 614; *Phelps v. Vischer*, 50 id. 69; *Cromwell v. Hewitt*, 40 id. 492; *Meyer v. Hibsher*, 47 id. 265; *Coulter v. Richmond*, 59 id. 478.)

Applying the law as expounded by these authorities, it will be seen that plaintiff's right of recovery is based upon the averment and proof of two facts:—

I. An intention of the indorser to become surety for the payment of the note in dispute.

II. That she (as payee) advanced money or property, or gave credit upon the faith of such security.

The first point raised upon the argument was, that the complaint was defective within the ruling of *Hahn v. Hull* (4 E. D. Smith, 664), and should have been dismissed. No motion to that effect was made on the trial, and ought not to be heard on the appeal. But an examination of the case last mentioned shows that the liability of the indorser (raised on a demurrer) was denied upon an averment that he "indorsed the note to induce the plaintiff to accept the same." In the case at bar it is alleged that the indorsement was made "for the purpose of obtaining credit for the defendant Van Winkle with the plaintiff." Such an allegation is, in my opinion, sufficient to allow proof showing an intention on the part of the indorser to become a surety for the maker of the note, and the exception on this point is overruled.

That plaintiff gave credit upon the faith of Averill's indorsement is fully established, for she so testified without contradiction.

A more delicate question arises as to Averill's intention in making the indorsement. His knowledge that Van Winkle intended to obtain credit with plaintiff (the payee) is not to be inferred, from the fact that he signed the note before the payee. (*Lester v. Paine*, 39 Barb. 616.)

He testified that the indorsement was made in pursuance of an agreement with Van Winkle for the purchase of stock

Schwarzansky v. Averill.

of the American Life Saving Suit Company, and that he did not deliver the note to plaintiff, but to Van Winkle, with whom all negotiations were made; and Van Winkle swears that the only communication he made to his codefendants was to the effect that he had an agreement with plaintiff, and could procure \$30,000 worth of the company's stock if they would indorse his note, and that such agreement was not carried out.

It has been shown, however, that the note in suit was given in part payment of another note, which plaintiff says she would not have surrendered but for the indorsements.

The jury may well have reasoned that the appellant intended to secure such a result, and loaned his name for that purpose. He was interested with Van Winkle in the purchase of stock of the company against which plaintiff held claims, and for which the \$1,500 note was accepted in payment and discharge. Before its maturity he applied to her attorney for an extension. As a lawyer, he must then have known the extent of his liability; that as a mere indorser he had incurred no obligation to the payee. Yet he makes a payment on account, and gives a new security, thereby seemingly recognizing his original indebtedness.

In view of all these facts, the verdict of the jury should not be disturbed.

The remaining exception as to the admission in evidence of the agreement of May 3, 1875, between the plaintiff and Van Winkle, is not well taken. It was part of the *res gestæ*—the basis of the transaction which resulted in the giving of the note in question—and provided for the settlement of claims against the company for whose stock the appellant was negotiating a purchase.

The judgment appealed from should be affirmed, with costs.

CHARLES P. DALY, Ch. J., and ROBINSON, J., concurred.

Judgment affirmed, with costs.

Wice v. The Commercial Insurance Co.

STELLA WICE, by WILLIAM WICE, her guardian *ad litem*,
Appellant, *against* THE COMMERCIAL INSURANCE COM-
PANY, Respondents.

(Decided June 4th, 1877.)

A defendant, upon the commencement of an action against him by an infant, is entitled to an appearance by such infant by a guardian *ad litem*, who is pecuniarily responsible for his costs. But if the defendant does not raise the question of the guardian's responsibility as soon as apprised of the person appointed, he acquiesces in his sufficiency to act in that capacity, and cannot afterwards attack it.

Where, therefore, after judgment for the defendant, an application was made to have all proceedings in the action on the part of the plaintiff stayed until payment of the defendant's costs :—*Held*, that the court, in the absence of some statutory provision, had no power to grant such an application.

APPEAL by plaintiff from an order of this court made at special term. The facts are stated in the opinion.

Adolph L. Sanger, for appellant.

William A. Coursen, for respondent.

ROBINSON, J.—In this action William Wice was appointed *guardian ad litem* at its commencement, in April, 1875; the action was tried, and judgment rendered in favor of the defendant in June, 1876, for \$149 30, on which an execution has been issued and returned wholly unsatisfied, and on proceedings by way of attachment against the guardian, under section 316 of the Code, it appears he has become insolvent and is unable to pay any part of such costs. An appeal has been taken by the plaintiff from the judgment to the general term, without security, and on such proof of the insolvency of the guardian an order has been made that all proceeding in the action, on the part of the plaintiff, be stayed until payment of defendant's said costs. The present appeal is from that order.

The defendant, upon the commencement of an action

Wice v. The Commercial Insurance Co.

against him, by an infant is entitled to an appearance by such infant by a guardian *ad litem*, who is pecuniarily responsible for his costs. (*Fulton v. Roosevelt*, 1 Paige, 178; *Wood v. Wood*, 8 Wend. 369; *Dalrymple v. Lamb*, 3 id. 424; *Cook v. Rawdon*, 6 How. Pr. 233; *Ten Broeck v. Reynolds*, 13 id. 462.) In all these cases the question as to the solvency of the guardian was raised at the incipency of the proceedings, and no countenance is given in any of them for any dismissal or stay of the plaintiff's proceeding, especially by way of stay of an appeal from an adverse judgment, by reason of the insolvency of the guardian occurring during the pendency of the action. It is the duty of a defendant to raise this question as soon as apprised of who is the person appointed as guardian, and if he does not then question his responsibility he acquiesces in his sufficiency to act in that capacity. The court does not, except in this respect and under some statutory enactments, have any just authority to insure to defendants security for their costs; and as a general rule, where such security is once given, as required by statute or a rule of court, and accepted without question, the subsequent insolvency of the sureties furnishes no ground for exacting other solvent parties to be substituted. (*Hartford Quarry Co. v. Pendleton*, 4 Abb. Pr. 460; *Eiesman v. Swan*, 11 id. 112; *Willett v. Stringer*, 15 How. Pr. 310; *Dudley v. Goodrich*, 16 id. 189.) This contingency has only received legislative recognition and been provided for (as far as discovered) in the amendment to section 335 of the Code made in 1859, authorizing the court, on an appeal from a money judgment, to require new sureties in place of such as have become insolvent. By the order appealed from, the infant plaintiff loses his right of appeal by reason of his guardian *ad litem* having become insolvent, unless on payment of defendant's judgment. No precedent or authority is found for such an order after appeal taken from an adverse judgment, or which can justify the extreme results which it produces. The appeal from the special to the general term without giving any security is a matter of right (*Genter v. Fields*, 1 Keyes, 483), and cannot be trammelled by any such summary order, preventing any

The Health Department of the City of New York v. Pinckney.

review of the justice of the judgment appealed from, until the plaintiff has fully satisfied its terms. In my opinion, the order should be reversed with costs and disbursements.

LARREMORE and JOSEPH F. DALY, JJ., concurred.

Order reversed.

THE HEALTH DEPARTMENT OF THE CITY OF NEW YORK,
Respondent, *against* MARY PINCKNEY, Appellant.

(Decided June 4th, 1877.)

The Health Department of the city of New York, created by the charter of 1873 (L. 1873, c. 335, § 80, p. 503), cannot sue for the penalty of \$30 for violation of a special order made by it, as the Metropolitan Board of Health (created by L. 1866, c. 74) could.*

The Health Department of the city of New York, created by the charter of 1873, is not such a continuation of the Metropolitan Board of Health, created by the act of 1866 (L. 1866, c. 74), as to make the statutory regulations for the enforcement of penalties by the latter body applicable to it.*

The provisions of the act amending the charter of 1873 (L. 1873, c. 757, § 12, p. 1125), by which the "authority, duty and powers" of the Metropolitan Board of Health are conferred upon the Health Department, did not give the Health Department power to sue for penalties in those cases where, by statute, the Metropolitan Board of Health had been entitled to do so.*

APPEAL by the defendant from a judgment of the Third District Court, in the city of New York.

The facts are stated in the opinion.

Allison & Shaw, for appellant.

W. P. Prentice, for respondent.

* The same decision as in this case was made by the Court of Appeals in *Health Department v. Knoll*, 70 N. Y. 530.

The Health Department of the City of New York v. Pinckney.

CHARLES P. DALY, Chief Justice.—The action was brought to recover a penalty of \$50 from the defendant, for neglecting to comply with an order made by the Health Department, directing her to fill up certain sunken lots, and the question presented and discussed upon the appeal is, whether the Health Department has a right to sue for such a penalty where it makes a special order, as in this case, and the party upon whom it is served neglects or refuses to comply with it.

The former Metropolitan Board of Health had such a right (L. 1866, vol. 2, p. 1462) ; but it does not follow that the present Department of Health have it, unless it is apparent that it was meant to be, and is, simply a continuation of the former body, with merely a change in the name, or a change or modification in some other respect, or unless there is some provision in the act creating it, or in some subsequent act, the intendment of which fairly is that it was to have this power.

It is not a continuation of the previous body, nor is there any provision in the act creating it reserving to it such a power ; but, in my judgment, the contrary.

The Metropolitan Board of Health was differently constituted, and had a different territorial jurisdiction, embracing the city and county of New York, and the whole or parts of adjacent counties, or so much of the territory of the State and of the cities, towns and villages thereof, as then composed the Metropolitan Police District of the State, and was denominated and known as the Metropolitan Sanitary District of the State of New York. It was composed of four sanitary commissioners of the district, appointed by the governor of the State, the health officer of the port of New York, and four commissioners of the Metropolitan police, who, together, constituted what was denominated the Metropolitan Board of Health. (L. 1866, c. 74, §§ 1, 2.) The present Health Department was created by the charter of 1873 (L. 1873, p. 505, ch. 335, § 80) for the city of New York alone ; and consists of the president of the board of police, the health officer of the port, and two commissioners of health, who, together,

The Health Department of the City of New York v. Pinckney.

constitute the board known as the Health Department of the city of New York, and which, within the limits of the city and county of New York, was created for the same purposes substantially, as the former Metropolitan Board of Health. We would not, however, be justified in holding that the new body, though created for the same general purposes, is to be regarded within the limits of the city and county of New York as a continuation of the previous body, so as to make the statutory regulations for the enforcement of penalties under the former body applicable to it. It differs in its organization, in its territorial jurisdiction, and what is more material, the act creating it contains entirely different provisions respecting penalties and the mode of enforcing them. The present body, the Department of Health, was required immediately upon its organization to frame a sanitary Code, embracing the existing sanitary ordinances, and to add to it, from time to time, for the security of life and health in the city of New York, and any violation of this Code, it is declared, shall be punished as a misdemeanor, and the offender shall also be liable to pay a penalty of \$50, to be recovered in a civil action in the name of the mayor, aldermen and commonalty of the city of New York, and all orders made by the pre-existing department, it is declared, may be executed and compelled by the new body. The new body, the present Department of Health, had it in their power to provide by this Code, that for any violation of their orders under it, the offender should be subject to punishment for a misdemeanor, and also to a penalty of \$50, leaving the penalty to be enforced, as the charter declares, in a civil action brought by the city. It is certainly a very anomalous proceeding, that for any violation of the sanitary Code, a penalty of \$50 may be recovered by a civil action brought by the city, and that a penalty of \$50 may also be recovered by the Department of Health for any violation of or refusal to comply with its orders, by the strained construction that the penalty of \$50, which the former Metropolitan Board of Health might recover against any person who should "violate or refuse to conform to any ordinance, rule, sanitary regulation, or special or

The Health Department of the City of New York v. Pinckney.

general order of *that board*” (L. 1866, Vol. 2, p. 1462), continues in force, although that board is abolished, entitling the new body to recover the same penalty from any one who violates or refuses to comply with its orders. Under the former board there was no sanitary Code with penalties for the violation of its provisions framed by the board, though there may have been existing sanitary ordinances, and this circumstance creates an essential difference. The sanitary Code adopted by the Health Department has made a very important and material change; and as the department could and still can make the proper provisions in the sanitary Code to enforce its authority by penalties to be prosecuted for in the mode provided for in the act creating it, there is no reason why it should resort to doubtful powers and be sustained in doing so. It is provided in the sanitary Code (§ 178), that any person who omits or refuses to comply with its orders shall be liable to the arrest, suit, penalty, fine and punishment provided for in the acts of 1866 and 1867; without saying anything about their liability to penalties or punishment under the charter of 1873, by which the department came into existence. This section (§ 178) also provides that any person who omits or refuses to comply with the provisions of the sanitary Code, shall be subject, not to imprisonment for a misdemeanor, and also to a penalty of \$50, under, the 80th section of the charter of 1873, but to the arrest, suit, penalty, fine and punishment as provided and declared in the acts of 1866 and 1867, thus entirely ignoring the provisions of this 80th section of the charter of 1873, or, at all events, in no way referring in this section of the sanitary Code to the liability of the offenders for violation of the Code under the act of 1873. Indeed, if it were in the power of the department to do so in the framing of the Code, it was providing that the prior legislation should be superior to and control the subsequent legislation. It was, in fact, enacting that penalties for the violations of the Code should not, as the charter of 1873 declares, be recoverable in a civil action brought by the city, but in an action brought by the Department of Health, or, in other words, assuming to the Depart-

The Health Department of the City of New York v. Pinckney.

ment of Health the whole authority to bring actions for penalties, whether brought for the violation of the Code, or for refusing or neglecting to comply with its special orders.

By the charter of 1873, § 119, the city of New York was excepted from the act creating the Metropolitan Sanitary District and Board of Health, and the acts amendatory thereof, and all statutes and provisions of law creating that district, were repealed, so that the Department of Health, as one of the departments under the charter, was created distinct from, and not in continuation of, the former board, in whole or in part, and being, as the former was not, limited in its territorial jurisdiction to the city of New York, there was a reason for providing that actions for penalties under the charter should be brought in the name of the city, as they are brought in like cases, for the violation of ordinances and other matters connected with the municipal government of the city; that is by the corporation attorney, as the proper officer of the law department, which, by the charter, is to have the charge and conduct of all the law business of the corporation and of its departments, and of all law business in which the city of New York should be interested, except as otherwise in the charter provided; and all actions to recover penalties for a violation of any law or ordinance are, it is declared, to be brought in the name of the mayor, aldermen and commonwealth, etc., and *not in that of any department*, and are to be conducted by the corporation attorney, subject to the control of the corporation counsel. (L. 1873, c. 335, p. 495, art. VI.) All this legislation, when taken together, and especially as enacted and arranged in the charter, shows very clearly what was intended; that actions for penalties arising under laws relating to the city, were to be prosecuted for in the mode provided for in the charter, and not to be brought, as this action was, by one of the departments under the charter.

By the supplemental charter of 1873 (L. 1873, p. 1125, c. 787, § 12), it was declared that the authority, duties and powers conferred upon the Metropolitan Board of Health, which were not inconsistent with the provisions of the char-

The Health Department of the City of New York v. Pinckney.

ter, were conferred upon, vested in, enjoined upon, and were to be exclusively exercised in the city of New York by the Health Department and Board of Health created by the charter; but were to be exercised in *the manner specified in the charter* and the acts amendatory thereof, and were *not to be inconsistent with it*—a provision which, so far from conferring upon the Department of Health the right to bring actions for penalties for the violation of the sanitary Code, or for any refusal or neglect to comply with its orders, recognized the provision already existing in the charter for the punishment and the penalty to which parties were to be subject who violated the provisions of the sanitary Code, and for the mode in which all actions for the recovery of the penalty were to be brought. The powers of the former Metropolitan Board of Health were conferred upon the Department of Health, so far as they were not inconsistent with the provisions of the charter, which, to my mind, clearly indicates that it was not intended to reserve to one of the departments the power to bring actions for penalties, the charter having expressly declared that such actions were not to be brought in the name of any department, but in that of the mayor, aldermen, etc. (L. 1873, p. 496, c. 335, § 38.)

This was the state of things up to the passage of the act of 1874 (L. 1874, c. 636, §§ 4, 5 and 8), which provided that the Board of Health might sue or be sued in the name of the Health Department of the city of New York, and that in all actions against the city in which any action, order, regulation, ordinance or proceeding of said board, or of any persons acting under or in pursuance of its authority, should be called in question, or made the subject of the action or proceeding, the Board of Health should be a necessary party and have a right to appear and take part therein by its own attorney and counsel, and might institute in its own name all such suits and proceedings as shall be *reasonable, necessary and proper*, for recovering any moneys expended enforcing any lien, or the payment of any fine, or the punishment for any offense, or in other respects carrying out the provisions of the laws under which it acts. This does not repeal the

The Health Department of the City of New York v. Pinckney.

provision of the charter, providing for the manner in which suits shall be brought for the recovery of the penalty of \$50 imposed by the charter, and if any meaning is to be attached to the words "*reasonable, necessary and proper*," in respect to suits for the payment of fines, it must mean cases for which no provision is made, and it is not 'reasonable or necessary' that they should sue for penalties for the violation of the sanitary Code when the charter of 1873 has fixed the amount of the penalty, and provided for the mode of its enforcement. If, however, it may be construed as authority to the department to sue in its own name for the penalty imposed by the charter of 1873, which I by no means concede, it does not apply to an action like this to recover a penalty of \$50 for refusing to comply with a special order of the Board of Health, there being no existing law creating such a penalty ; and no such penalty being created by the sections referred to in the act of 1874. The provisions made by the charter of 1873 superseded and took the place of the prior provisions giving the Metropolitan Board of Health both the power to sue for penalties as well as the penalties themselves. It provided for the penalty which was to be recovered, and in no way continued the existing penalties. It provided also, as I have said, for the manner in which that penalty should be sued for ; and there is nothing in the act of 1874, authorizing the Health Department to sue for it, or for any penalty for refusing or neglecting to comply with its orders, for the authority, duties and powers of the former Metropolitan Board of Health, which were reserved to the present Department of Health by the act of 1873, were, as I have said, by that act to be exercised in the manner specified by the charter, and were not to be inconsistent with it, which would be, and is the case, if actions are brought for penalties under the acts of 1866 and 1867, instead of under the sanitary Code, and in the manner provided for in the charter of 1873. It is a familiar rule that penal acts are to be construed strictly ; that they are never to be extended by implication ; and that that course is to be taken in their construction which promotes, in the fullest manner, the ap-

Weed v. Burt.

parent policy and objects of the Legislature. (Potter's Dwarrris, p. 245, *note*, and the cases there cited.) There is nothing in the act of 1874 which gives the Department of Health the power to impose any fine or penalty. It certainly contemplates their right to sue for the payment of a fine, and for all that I know, there may be cases to which it would apply. It does not, however, give the Department any such action as they have in this case brought to recover a specific penalty of \$50, not for a violation of the sanitary Code, but for refusing to comply with a special order they have made.

In my opinion, this action was without authority of law, and the judgment should be reversed.

JOSEPH F. DALY and VAN HOESEN, JJ., concurred.

Judgment reversed.

JOHN R. WEED, Appellant, *against* EDWIN C. BURT,
Respondent.

(Decided June 4th, 1877.)

A judgment for the plaintiff in an action for salary for the month of January, 1871, under an allegation of a hiring for a year, from January 1st, 1871:—*Held*, not to estop the defendant, in a subsequent action for salary for months subsequent to January, 1871, from showing that the plaintiff had been discharged by him during the month of January, 1871, and had not thereafter rendered any services to the defendant, or made any tender of any.

Where a servant hired for a definite term has been wrongfully discharged, before the expiration of the term, he can not sue for wages for the period subsequent to his discharge, but his remedy is by an action for damages for breach of the contract of hiring.

APPEAL by the plaintiff from a judgment entered on the decision of Judge ROBINSON, after a trial before him without a jury.

Weed v. Burt.

The following opinion, which states fully the facts of the case, was filed by Judge ROBINSON with his decision: "Plaintiff was employed by the defendant as a clerk for one year, from January 1st, 1871, at an annual salary of \$3,000, payable monthly, and this action is brought to recover his wages at that rate from May 1, 1871, to January 1, 1872, to wit: \$2,000 less \$600 he admits having earned elsewhere.

The complaint alleges that, in pursuance of such hiring, he entered upon the discharge of his duties, but makes no averment of having performed any services for the period in question, beyond alleging that "he was at the time of his employment then, and at all time since, ready and willing to perform the same" (his services as clerk).

The testimony shows he was discharged from such employment on the 20th of January, 1871; that he then claimed his engagement was for a year, and then said, "he would remain for the year," but he left, and thereafter never performed any services nor made any tender or offer of his services.

He rests his right of recovery of wages for the eight months in question, mainly upon the effect which he claims resulted from a judgment rendered in his favor before Justice Fowler of the Third Judicial District of this city, in an action instituted by him in February, 1871, wherein he claimed to recover on the said contract for his employment for a year, a balance of \$70 50 of wages accruing for the month of January.

In that action he made a like allegation of his readiness and willingness to perform the services required by the agreement without averment of performance, and the defendant for answer denied the agreement and set up as a defense, that plaintiff continued in his employ from the 1st to the 20th of January under a different agreement for mere temporary employment.

The case was determined in plaintiff's favor without any specific finding, and he recovered judgment for \$37 42. Justice Fowler testified he rendered judgment "for one month's wages, crediting the defendant, however, with pay-

Weed v. Burt.

ments and set-offs, no allowance being otherwise claimed or made for damages occasioned by plaintiff being illegally discharged. The sole issue presented was, whether or not the alleged contract was for one year with a proportional amount of salary payable monthly. No question was raised as to plaintiff's discharge during the month, or failure to perform services during the whole of that period."

Whatever, if any, error exists in that judgment, it established the agreement as contended for by the plaintiff, and that he had performed such services during the month of January as entitled him to recover wages for that month; it did not, however, upon any latitude of construction, decide that plaintiff could recover wages for any subsequent month without the performance of any service, or that he could recover anything by way of wages, or as damages, without any tender of his service or offer of performance. Mere readiness or willingness to perform a duty or obligation, for performance of which a party is to receive compensation, constitutes no meritorious right of recovery unless the other party, as a condition precedent, is required by law or contract to do some prior act, or has refused to carry out the contract on his part; and a tender of performance by a party claiming to recover as for a constructive performance is otherwise indispensable.

This is not an action to recover damages arising from an illegal discharge from employment, but for wages earned upon a mere averment of a supine or tacit readiness and willingness to perform, without notice thereof, and of a claim that the contract is still subsisting, or a tender of performance being alleged or proved. A recovery of wages for the month of January, during which plaintiff was absent from his employment after the 20th, could upon no principle of estoppel be held to entitle him to recover wages for a subsequent month, when he neither performed nor offered to perform any service whatsoever.

The law is too well established to admit of question, that wages can only be earned and recovered for services actually performed, and that if the servant has been wrongfully dis-

Weed v. Burt.

charged, and has not performed the services because of not being permitted to do so, his only remedy is by an action for damages. (*Moody v. Leverich*, 4 Daly, 401; *Howard v. Daly*, 61 N. Y. 362.) The former judgment was conclusive as to the agreement for the employment of the plaintiff upon the terms stated in the complaint, as that question was directly litigated. It fully established the plaintiff's right to wages earned for the month of January, but it no otherwise gave countenance for any recovery for any subsequent month's wages without any performance of the services. (*Hughes v. Alexander*, 5 Duer, 488; *Van Alstyne v. Indiana, Pitt. & Cleve. R. R. Co.*, 34 Barb. 28.) I therefore find as matters of law:

1. That the complaint, for want of allegation of performance, does not state any cause of action.

2. Accepting the proofs (under any power of amendment), no right of recovery is established because of non-performance of any such service as the contract required during the period claimed, to wit: from May 1st, 1871, to the end of the year.

3. The judgment rendered by Justice Fowler, in no manner estops the defendant from asserting in this action either of the foregoing propositions.

"Judgment is therefore rendered in favor of the defendant."

From the judgment entered in accordance with the foregoing opinion the plaintiff appealed.

Wm. Henry Arnoux, for appellant.

A. B. Capwell, for respondent.

CHARLES P. DALY, Chief Justice.—The judgment recovered in the Third District Court, before Judge Fowler, was conclusive between the parties as to certain facts, which are: That the plaintiff was hired by the defendant on January 1st, 1871, for the period of one year, at the rate of \$3,000, payable monthly; that in pursuance of this agreement, there was due to the plaintiff the sum of \$37 42 for his wages under

Weed v. Burt.

this agreement for the month of January, after deducting payments that had been made to him; and a counter-claim which the defendant had against him.

The present action was brought to recover \$2,000 for the plaintiff's wages under this contract, from May 1st, 1871, to January 1st, 1872, after deducting the amount earned and received by the plaintiff for work and services performed by him for other persons, after July 1st, 1871, and, as averred, during the continuance of the contract.

The plaintiff testified that from May 1st, 1871, to January 1st, 1872, he was ready and willing to perform the services under the contract made with the defendant, and that he made a tender of his services on the first day of February to the defendant.

The defendant proved that he discharged the plaintiff on the 20th of January, 1871; that the plaintiff then left his employment, and that he has never performed any services for the defendant since.

This evidence on the part of the defendant was objected to by the plaintiff, upon the ground that he could not show that the plaintiff was dismissed during the month of January, 1871, as that was a matter of defense in the action in which the judgment was recovered, and that the judgment was conclusive on that point. The judgment in that action was conclusive as respects the wages claimed for and recovered in it; but it is in no way conclusive upon the question in this action, whether the plaintiff was in the defendant's service during the time for which he sought to recover; that is, from the first of May, 1871, to the first of January, 1872; and as respects that claim, it was certainly competent for the defendant to show that before that period commenced the plaintiff was discharged, and had not, during that period, been in the defendant's service. There is nothing in the recovery of the previous judgment to cut him off from showing that fact. To maintain an action for wages upon the contract, the plaintiff had to show that he had performed the services contracted for, or had made sufficient tender of them. (*Moody v. Leverich*, 4 Daly, 403; *Smith v. Hayward*,

Weed v. Burt.

7 Adol. & El. 544; *Fewings v. Tisdal*, 1 Exch. 295; *Elderton v. Emmens*, 6 C. B. 178; *Howard v. Daly*, 61 N. Y. 362.) If he was prevented from performing them by his employer, his remedy is a general action to recover damages for the breach of the contract. This was not an action for recovering damages, but to recover \$2,000, which, it is alleged, became due to the plaintiff, and which sum the plaintiff reduces to \$1,400, allowing to the defendant the amount which he, the plaintiff, received during that time, for work done for other persons.

The proposition of the appellant, so far as I understand it, amounts to about this: That because judgment was given in the plaintiff's favor for a month's wages, for the month of January, under this contract, the judgment is conclusive to show that the plaintiff was not discharged by the defendant during that time; and that his being allowed in this action to show that he dismissed the plaintiff on January 20th, 1871, was erroneous. But that judgment covers only the plaintiff's right to wages during that month. It does not, and cannot, estop the defendant from showing that after that time, and during the whole of the time for which wages are sought to be recovered in this action, the plaintiff was out of his employment, and performed no services under the contract whatever, and made no tender of any. And this he did show by proving that the plaintiff had not been in his employment since January 20th, 1871, which fact being uncontradicted, established that the plaintiff's only remedy was an action for damages under the contract. He relies upon the averment and proof, that on the first of February he tendered his services, and was, up to the time agreed upon, ready and willing to render them. But this will not entitle him to maintain an action on the contract for the recovery of the stipulated wages. To authorize such a recovery, actual performance of the services contracted for must be shown, and a tender of them, or readiness and willingness to render them, will not authorize such a recovery. If the plaintiff was prevented by the defendant from performing the services, his remedy, and his only remedy, was an action to recover damages for the

Bedell v. The North America Life Insurance Co.

breach of the contract, and that is not the action which he has brought.

The judgment should be affirmed.

LARREMORE, J., concurred.

JOSEPH F. DALY, J. [concurring].—It may be observed that the plaintiff, while objecting to proof by defendant that he was discharged and out of the latter's employment during the period for which he now sues, yet admits, and, in fact, himself avers that to be so, by allowing in his complaint \$600 earned during the time by services to others than defendant.

Judgment affirmed.

VIOLETTA A. BEDELL *against* THE NORTH AMERICA
LIFE INSURANCE COMPANY.

[SPECIAL TERM.]

(Decided June 15th, 1877.)

Any policy-holder in a life insurance company, incorporated under the general life insurance act of 1853, can maintain an action against the company for the purpose of compelling a settlement of the amount of the dividends which, under the provisions of the charter of the company, should be apportioned to the plaintiff as her share of the profits, and to compel the company to go on and transact its business as required by its charter, notwithstanding, in proceedings instituted by the attorney-general for the dissolution of the company, a receiver has been appointed.

Quære, whether an admission of service of an order to show cause why a receiver should not be appointed of a corporation, in proceedings by the attorney-general to dissolve it, made by the attorneys of the corporation, is sufficient to give the court jurisdiction to make the order appointing the receiver.

The fact that the affairs of a life insurance company,—organized under the general life insurance act of 1853,—are being wound up and adjusted in proceedings in the Supreme Court, under the care of a receiver, will not prevent this court from entertaining an equitable action to ascertain and enforce the rights of policy-holders in the company, either on the ground that a conflict of jurisdiction may

VOL. VII.—18.

Bedell v. The North America Life Insurance Co.

be created, because any conflict of decisions may be settled by an appeal to the Court of Appeals, nor on the ground that a multitude of suits may be brought, because the court has the power in its discretion to allow one suit to be tried and stay all similar ones until that one is finally determined by the court of last resort.

MOTION by the plaintiff to have Henry R. Pierson, who had been appointed receiver of the defendant corporation, substituted in place of the corporation as the party defendant. The facts on which the application was founded and opposed are stated in the opinion.

William Barnes, for the motion.

Peckham & Tremain, for Henry R. Pierson, as receiver, opposed.

CHARLES P. DALY, Chief Justice.—This is not an action brought for the dissolution of an insurance company and the distribution of its assets, and therefore involves no such question as was passed upon by Judge Westbrook in the matter of the attorney-general against the Continental Life Insurance Company, at the Ulster special term of the Supreme Court, March 31, 1877.

It is an equitable action, brought against the North America Life Insurance Company for the purpose of compelling a settlement of the amount of the dividends which, under the provision of the charter of the company, should be apportioned to the plaintiff as her share of the profits, and to compel the company to go on and transact its business as is required by its charter. It is averred in the complaint, that there is \$900,000 worth of profits. That the company, in violation of its charter, was not transacting its business, but had unlawfully combined and confederated with the Universal Life Insurance Company, for the purpose of making a practical amalgamation of the two corporations, and of injuring and destroying the rights of the policy-holders in the North America Life Insurance Company; and of transferring its assets and reinsurance fund on deposit at Albany and in its possession, into the funds and assets of the Uni-

Bedell v. The North America Life Insurance Co.

versal Life Insurance Company. It is averred that it was alleged, that the North America Life Insurance Company was imperilling its assets in consequence of holding certain items of assets, which were not allowed by the various insurance departments, and that it was reinsured by the Universal Life Insurance Company; that the officers of the North America Life Insurance Company resigned their positions and were replaced by officers and managers of the Universal Life Insurance Company, the latter company assuming, up to the commencement of this suit, the entire control and management of the affairs of the latter company, whilst in fact, as is averred, there has been no legal reinsurance of that company. It is further averred that, as a consideration for the resignation of the officers of the North America Life Insurance Company, the sum of \$400,000 was paid in cash to it, and certain illegal and questionable assets were transferred to the officers and managers of the Universal Life Insurance Company. That since these acts, its officers and managers have ceased to transact any new business, and have, as far as possible, weakened the company by transferring its policy-holders to the other, which is one doing business on the same mutual plan. That when the transfer of the policies was made, the policy-holders had received only a small proportion of the net value of their policies; and that, although the number of policies have greatly diminished, large profits have been thereby made, which legally and justly belong to the remaining policy-holders. It is averred that, in addition to the \$400,000 received by them in the attempted amalgamation, the profits made by the company, from lapses, and surrender of policies and otherwise, exceed the sum of \$500,000; and that the same have not been divided and apportioned to the policy-holders, as required by law.

The relief asked is, that the defendant, the North America Life Insurance Company, should make a full and exact statement of its assets and liabilities, its receipts and payments since the date of its last dividend, and that an account be had, whereby the just and legal dividends payable to

Bedell v. The North America Life Insurance Co.

the plaintiff can be ascertained, apportioned and paid. That the company be enjoined perpetually from transferring or changing the policy-holders into the said Universal Life Insurance Company, and be compelled to continue and transact their business as required by their charter and the laws of the State.

After the commencement of this suit, and while it was pending, proceedings were instituted before Justice Landon, of the Supreme Court, for a dissolution of the North America Life Insurance Company and the appointment of a receiver. They were instituted by the attorney-general, upon the receipt by him of a letter from the superintendent of the insurance department, John T. Smythe, Esq., to the effect that in the opinion of the superintendent, the affairs of the company were in such a condition as to render the issuing of additional policies and annuity bonds injurious to the public interest. This letter to the attorney-general, it is alleged in the moving papers, was sent to that officer without that examination into the affairs of the company by the superintendent which the law requires; which is denied by the affidavit of the deputy superintendent, read upon this motion, who swears that an examination was made into the affairs of the company at its office in New York; that the result of the examination was embodied in a report by the superintendent, and that the report is on file.

No summons or other process was served upon the company in the manner required by the Code, for the institution of suits or proceedings against corporations, but an admission of service was given by Alexander & Green, as attorneys of the company. An order was made by Justice Landon, on the written application of the attorney-general, requiring the corporation to show cause before the judge, at a day and place named, why the business of the company should not be closed and a receiver thereof appointed, due service of a copy of which order was admitted in writing by Alexander & Green, signing themselves attorneys for the corporation. Upon this admission of service, no opposition being made, as is alleged, Justice Landon ordered and decreed that the com-

pany should be enjoined and restrained from the further prosecution of its business, and that Henry R. Pierson be appointed receiver of its assets and credits, upon giving the requisite security; and providing that no application should be made to any court in any matter connected with the duties of the receiver or the funds or assets of the company, or their transfer, sale or delivery, unless five days' notice be first given to the attorney-general. It further declared that all suits, proceedings or actions of every kind against the corporation, or in which it was a party, should be stayed until such receiver was substituted therein; and all persons were restrained and enjoined from commencing, continuing or maintaining any suit or action thereafter, for any cause whatever, against the corporation. The effect or meaning of this I understand to be, that all further suits, or the continuance and maintaining of suits, should be against the receiver, and not against the corporation.

It is insisted on this motion that Justice Landon could not acquire jurisdiction to make this order or decree against the corporation, upon the written admission of service by Alexander & Green, assuming to act as attorneys of the corporation. But that is not a question that I am required to pass upon, for assuming, as may be the case (*The American Ins. Co. v. Oakley*, 9 Paige, 491), that the admission of service of the order to show cause by the attorneys was sufficient to give the court jurisdiction, there is nothing in the order made by Justice Landon which prevents the granting of the application that the receiver be substituted in place of the corporation in this action, or be made a party to it. The order or injunction goes no farther than to stay proceedings in all pending suits until the receiver is substituted therein in place of the corporation, which is all, substantially, that is sought in this motion in asking that the receiver be made a party in this suit.

I do not understand Judge Landon, from anything contained in his order, as enjoining any further prosecution of suits that may have been commenced against the corporation, and requiring the parties in these suits to apply thereafter in

Bedell v. The North America Life Insurance Co.

the court appointing the receiver for any relief, legal or equitable, to which they might be entitled, but simply to impose, by his stay, the necessity of making the receiver a party to all these suits, that he may protect the interests of the corporation, and all who directly or indirectly may be affected, as all the rights, powers and duties of the corporation are now vested in the receiver.

It appears to be assumed, in the argument made on behalf of the attorney-general, that having instituted this proceeding to suspend any further transaction of business on the part of the corporation, and a receiver of the corporate effects having been appointed, that everything pertaining to the affairs of the company, or the rights or claims of parties against it, is to be left to the receiver, subject to such directions as he may receive, or such control as may be exercised over him by the court which appointed him; that the parties who have rights of action against the corporation, or who may, before his appointment, have commenced actions against it, must thereafter apply to that court, and can obtain in that court alone the relief, legal or equitable, to which they may be entitled. It is suggested that there are several suits of the same nature as this which were pending when the proceeding was instituted by which the receiver was appointed, and that it would subject him to great annoyance, trouble and embarrassment if he is compelled to become a party in each of these suits in different courts; that it would be more just to him and a sufficient protection to these suitors to compel them to suspend any further prosecution of their claims until he has examined fully into the affairs of the company and ascertained their respective rights, when they can be adjusted and settled under the direction of the court that appointed him.

I am not aware of any such practice, or of any authority for it. A receiver of an insolvent corporation has no greater rights than the corporation. He is bound by all its legal acts; is subject to all the rights and equities existing against it, and the liabilities or rights of third parties are not changed by his appointment. He simply takes its place and stands

Bedell v. The North America Life Insurance Co.

as its representative, being also the trustee for the stockholders and creditors, whose rights he may assert if they have been affected by the fraudulent or illegal acts of the corporation. (*Hyde v. Lynde*, 4 N. Y. 387; *Bell v. Shibly*, 33 Barb. 614; *Devendorf v. Beardsley*, 23 id. 656; *Wilson v. Wilson*, 1 Barb. Ch. R. 592; *Gillet v. Moody*, 3 N. Y. 480; *Talmadge v. Pell*, 7 id. 328; *Leavitt v. Yates*, 1 Edw. 134; *Lincoln v. Fitch*, 42 Me. 456; *Skip v. Harwood*, 3 Atk. 564; *In re Colvin*, 3 Md. Ch. Dec. 278; *Portman v. Mill*, 8 L. J. [N. S.] Ch. 161; *Delany v. Mansfield*, 1 Hogan, 234; 2 Barbour's Chancery Practice, vol. 1, p. 659, 2d ed.; Edwards on Receivers, p. 12, 2d ed.)

A receiver of an insurance company, appointed under the provisions of a statute, is subject to the control of any court in the State which has equitable jurisdiction, in the same way that he was subject to the control of the former Court of Chancery, though not appointed by that court. (*In the matter of the Globe Ins. Co.*, 6 Paige, 102; *Holbrook v. The American Fire Ins. Co.*, id. 220; 2 Rev. Stat. p. 464, § 41.) Where the statute has prescribed a summary mode of closing up the affairs of insolvent corporations without the expense and delay of formal suits to settle and ascertain the claims of creditors, that mode must be pursued; and in such cases suits will not be allowed to be commenced by creditors to ascertain their rights to a distributive share of the fund; but they will be compelled to submit to a reference under the statute. (Per WALWORTH, C., in *Globe Ins. Co.*, *supra*.)

But this is not such a case. It was an application to the Supreme Court, under the act of 1870, to wind up the affairs of an insolvent life insurance company, and for the appointment of a receiver, and the proceeding in no way affected the rights of the parties in the pending suits. What the effect might be if the Supreme Court of the district in which the receiver has his office had, under the statute (L. 1862, c. 412, and c. 373, pp. 625, 743), appointed a referee, to whom, by the statute, all controversies relating to the receiver's business may be referred, is a matter which it is not necessary now to consider, as there is nothing before me to show that any such

Bedell v. The North America Life Insurance Co.

appointment has been made. The receiver of such a corporation has, by statute, all the powers and authority conferred by law upon trustees to whom the assignment of the estate of an insolvent debtor may be made, and some other peculiar and special powers (2 R. S. 469; Laws of 1858, c. 314, and of 1852, c. 71); but there is nothing in these statutory provisions indicating that suits pending against such a corporation are abated when the receiver is appointed, or which provides any statutory mode for determining such rights as are sought to be enforced in the pending suits; but on the contrary provisions authorizing the court to continue a suit where the corporation has been dissolved (Act of April 26, 1832, § 4, c. 295; 3 Edmonds' General Statutes of N. Y., p. 674).

The fact that there are several such suits in different tribunals, seeking substantially the same relief, is no more a matter of consideration after the receiver has been appointed, than it would have been previously on the part of the corporation, whose representative he has become; and whatever order may be made, or judgments or decrees rendered in these suits, the receiver will have to abide by and submit to as the corporation would have had to. (2 R. S. 464; *Holbrook v. The Receiver*, 6 Paige, 226; *The Guardian Savings Institution v. The Bowling Green Savings Bank*, 65 Barb. 275.) Where he has to have the authority of the court before he can originate any proceeding, or do certain acts, it may be that he should apply to the court that appointed him for authority or direction; but where an order is made or judgment rendered by a court having equitable jurisdiction of the parties to be affected, a receiver stands in no different position than the parties he represents, and must obey the order or judgment of the court, as they would have been bound to do.

The plaintiff has brought this suit upon the ground that the officers or trustees of the corporation whose receiver Mr. Pierson has become, have conspired with another corporation to deprive its policy-holders of their rights. It is alleged that the corporation is not and never was insolvent; that it is able to carry on its business, and could have carried it on

Bedell v. The North America Life Insurance Co.

but for the collusion of its officers with the Universal Insurance Company; a fact, indeed, which is admitted by the demurrer that has been interposed; and it is alleged in the affidavits that the proceeding by which the receiver was appointed was instituted by the collusive co-operation of the officers of both companies. So far as the receiver is concerned, any collusion on his part is denied by his affidavit, but that denial extends only to himself personally, and even then is not conclusive, for the plaintiff is not shut off from inquiry by the denial in the affidavit. But whatever may be the position of the receiver, I must assume, until the demurrer is disposed of, that there is a good cause of action stated in the complaint, and that the plaintiff is entitled to have the receiver made a party to the action, that she may require him, as the representative of the corporation, to submit to such orders as may be made in the suit, or such judgment as may be rendered, if the court should grant the equitable relief sought.

That there may be a conflict of jurisdiction, as there are several suits pending in different tribunals by different parties for the same kind of relief, though suggested, is not necessarily to be anticipated. The rights of all the parties may be adjusted, and in such cases usually are without any conflict of authority; but if it should arise, the respective tribunals are each subject to the higher authority of the Court of Appeals, which in such a case can be invoked, and its decision will be controlling and conclusive on all parties. As these suits were pending in different tribunals when the receiver was appointed, there was as much ground then as there is now for apprehending a conflict of authority, and it is in no way increased by the appointment of the receiver. So far as it presents any difficulty, it was just as likely to arise under the former equity system, if several suits for the same equitable relief had been brought by different parties before different vice-chancellors. One might have granted the relief sought, and the other denied it; in which case the party considering himself aggrieved could have appealed to the chancellor, who would have determined whether it could

Bedell v. The North America Life Insurance Co.

be had or not. In the same way, if there should be any conflict between the different tribunals in which the present suits are pending, it can be settled, and settled finally, by an appeal to the Court of Appeals. If the receiver is made a party to these suits, and takes the place of the corporation, he will be enabled in any of the suits to obtain a controlling and final decision upon any question involved, if one tribunal should hold differently from another in respect to the rights of the company, the receiver, or the rights of any of the parties in these suits.

But there is another and more effectual way of avoiding any such conflict of authority. It is recognized in equity that if several suits are brought by different parties relating to the same subject matter, seeking the same relief and requiring the same investigation, the court, to save the fund from being charged with unnecessary expenses, may direct that but one of the suits be tried, and that the parties in the others be allowed to participate. (*Cumming v. Slater*, 1 Y. & C. Ch. 484; *Therry v. Henderson*, id. 481; *Godfrey v. Maw*, id. 485; *Turner v. Dorgan*, 12 Sim. 504; *Pindar v. Smith*, Mad. & Geld. 48; *Campbell v. Campbell*, 2 My. & Cr. 25; *Taylor v. Oldham*, Jac. 527; *Starten v. Bartholomew*, 5 Beav. 372; 2 Daniels' Chancery Practice, 995 [960, 961], 1 id. 92, 2d Am. Ed.) If the receiver is made a party in the several suits, he can apply to the courts where those suits are for the entry of an order in each case with the consent of the court, that there shall be a trial of but one of the actions and a stay of proceedings in the others until that cause is carried to a decree. The comity of courts will facilitate any such procedure by which the expenses of the fund will be diminished, whilst the ends of justice will be attained. Usually, priority will be given to the suit which was first brought (*Campbell v. Campbell*, 2 My. & Cr. 30), unless a subsequent one is more comprehensive or better adapted for ascertaining the rights of all parties, or all the parties agree as to the one to be selected. Upon an application to the court in which the cause is to be tried, an order can be obtained that the parties plaintiffs in the other actions be allowed to attend the

Noe v. Gregory.

trial by counsel, or if they so elect, they can be made parties. (*Pindar v. Smith*, Mad. & Geld. 48; 2 Daniels' Chancery Practice, 1350 [1305], 2d Am. Ed.; 2 Barbour's Chancery Practice, 477, 2d ed.; Code, § 122; *McMahon v. Allen*, 12 How. Pr. 39; *Davis v. Mayor of N. Y.*, 6 Duer, 663; *State of N. Y. v. Mayor of N. Y.*, 3 id. 121; *Shaver v. Brainard*, 29 Barb. 25.)

A motion to make the receiver a party defendant in this suit will therefore be granted, and a like decision will be rendered in the cases of *Carlisle v. The Guardian Mutual Life Insurance Company*, and *Ross and others v. The same*; these cases presenting exactly the same question.

ISAAC C. NOE, Respondent, *against* GEORGE GREGORY,
Appellant.

(Decided June 18th, 1877.)

Where a person without authority assumes to make a contract in the name of another, he does not thereby become personally liable on the contract, and the only remedy against him of the person contracted with is by an action for deceit in case he has acted fraudulently, or if there were no fraud therein, by an action for the breach of the warranty of authority.

Whenever a person assumes to act as the agent of another, he impliedly warrants that he has authority to so act.

In an action for such breach of the implied warranty of authority, after it appears that the defendant assumed to act as agent for a third person, the burden of proof is not thereby cast on the defendant to show that he had actual authority to so act, but the burden is upon the plaintiff to show that he did not have such authority.

APPEAL by the defendant from a judgment of the Sixth District Court in the city of New York.

The facts are stated in the opinion.

VAN HOESSEN, J.—The complaint is in writing, and is in substance the ordinary *quantum meruit* count in assump-

Noe v. Gregory.

sit; the plaintiff claiming to recover the reasonable value of his services as a cutter and tailor rendered to the defendant.

The answer sets up that the services sued for were performed under a sealed agreement entered into and executed by the plaintiff, and by one E. Quinn, for whom the defendant signed as attorney in fact. The answer further alleges that the plaintiff was discharged for unskilfulness at the end of a few weeks' service, though the period of employment was one year, and that the only compensation provided for in the agreement was, that plaintiff should receive one-half of the net profits of the business; and the answer further avers that no profits had accrued.

The justice gave judgment for the plaintiff for two hundred and fifty dollars.

The evidence disclosed the fact that the plaintiff was informed that E. Quinn was the person in whose name the business was conducted, and that the defendant was acting as Quinn's agent. In consequence of the defendant acting as agent for Quinn, the plaintiff, whose son drafted the articles of agreement, caused the contracting parties to be described as Isaac C. Noe of the one part, and G. Gregory, attorney, of the other part. The agreement is signed and sealed in the following manner: Isaac C. Noe (seal); E. Quinn per G. Gregory (seal).

Taking the entire instrument together, there is no doubt that the defendant executed it, not as principal, but as the agent of Quinn; and that the contract is in no sense the contract of the defendant.

Upon the trial, the plaintiff attempted to show, by his cross-examination of the defendant and the defendant's son, that there was no such person as Quinn; and I think it probable that the justice rendered judgment in favor of the plaintiff, because he had doubts as to the existence of Quinn.

Parsons in his work on Contracts, vol. 1, marg. p. 58, says that an agent may be reached in assumpsit if work and labor be done for him under a supposed contract, which he was not authorized to make for his pretended principal. The writer cites no authority to sustain his position; more

Noe v. Gregory.

recent text books state the law differently. Thus in Wait's Law of Actions and Defenses, vol. 1, p. 258, it is said that "If a person falsely represents himself to be the agent of another, and to have authority to contract for him, and he does so contract without authority, the only remedy is by an action against him for the fraud or deceit." Wait further states that if an agent innocently assumes to act as such, believing himself authorized to contract for his principal, he is liable, not for deceit, but upon an implied warranty of authority. In the first quotation I have made from Wait, he is not sustained by the *dicta* of Judge Selden in *White v. Madison* (28 N. Y. 117) or of Judge Andrews in *Dung v. Parker* (52 N. Y. 494) and in *Baltzen v. Nicolay* (53 N. Y. 467), for those judges say that the agent is liable upon an implied warranty of authority, whenever, whether innocently or fraudulently, he assumes, without authority, to make a contract in another's name. If the question must not be considered as settled in this State, I should be inclined to adopt the view, that the only action against the pseudo agent who knowingly acts without authority, should be deceit. The later decisions in this State seem to me to leave no doubt as to the incorrectness of Mr. Parson's statement, that a self-styled agent may be sued in *assumpsit* upon a *quantum meruit* for work and labor done under a contract made by such pretended agent in the name of another. I think the law of New York now is, that the pretended agent is only liable to an action of deceit, or to an action for the breach of warranty as to his authority. Either form of action will apprise him that the question to be litigated is his authority to act for the person whom he represented to be his principal; and he may come prepared to try that issue.

In the case at bar, the question as to his right to represent Quinn seems to have been sprung upon the defendant at the trial. Upon the cross-examination of the defendant, various questions were put with a view to elicit answers from which an argument might be drawn that Quinn was so inattentive to the business that it was improbable that he had any interest in it. This was all the plaintiff proved, to

Schenke v. Rowell.

sustain the position he took that the real principal was the defendant. Even if the defendant were liable in *assumpsit* for the reasonable value of the plaintiff's services rendered in pursuance of the agreement, the burden rested upon the plaintiff of proving that the defendant assumed without authority to act as the agent of Quinn. This proof the plaintiff did not furnish. Conscious that he had not done so, he contended upon the argument of the appeal that the burden lay upon the defendant of showing that he was in fact Quinn's agent. The law did not cast any such onus on the defendant, but, on the other hand, it was of the very substance of the plaintiff's case to prove that the defendant was acting without authority. There was an utter failure to prove that the defendant assumed without authority to be the agent of Quinn. The decision of the justice was doubtless influenced by the mass of irrelevant testimony, which, under one pretence or another, was dragged into the case.

The judgment should be reversed.

CHARLES P. DALY, Ch. J., and JOSEPH F. DALY, J., concurred.

Judgment reversed.

WILLIAM M. SCHENKE, Respondent, *against* GEORGE P. ROWELL *et al.* Appellants.

(Decided June 18th, 1877.)

Where in a building contract the certificate of the architect that the building has been done in compliance with the contract is made a prerequisite of payment for such building, the architect is accepted by the contracting parties as an umpire, and neither party can avoid the effect of his certificate or refusal to give a certificate by the mere allegation that his certificate or refusal is unreasonable, nor can the parties litigate the matters thus submitted to him, until he is divested of his powers as umpire by death, incapacity, resignation, or refusal to act.

Schenke v. Rowell.

In an action to recover the contract price for the erection of a building, a complaint setting forth a contract which provided that payment should be made when the work was done according to the contract, approved of by the architect, and a certificate of performance given by the architect, and alleging that plaintiff performed the work according to contract, that the defendants accepted the work, and that the architect had unreasonably refused to give the certificate, is bad on demurrer, as not stating facts sufficient to constitute a cause of action.

Held, further, that such complaint was defective in substance ; that the mere allegation of complete performance of the work did not show a right of action, since there was no architect's certificate ; that the failure of the complaint to show that the architect's certificate had been given was not remedied by an allegation that the certificate was unreasonably refused, and that the mere allegation that the defendants had duly accepted the work, without the additional allegations that such work was a full compliance, and was received by the defendants as a full performance, did not remedy the omission of the complaint to show that such certificate had been given.

APPEAL by the defendants from an order of this court made by Judge LARREMORE at special term, overruling a demurrer to the complaint.

This action was brought by Schenke to recover part of the last installment of the contract price for the erection of a building for the defendants.

The complaint set forth the contract, which provided that Schenke should erect the building in accordance with the plans and specifications of the architect, in a good, workmanlike and substantial manner, to the satisfaction and under the direction of the architect, to be testified by a certificate under the hand of said architect. In consideration of the performance thereof by Schenke, the defendants were, by the terms of the contract, to pay him \$6,550, as follows:—1st, when the frame is raised, \$800 ; 2d, when enclosed, \$1,500 ; 3d, when finished, except boxes and painting, \$1,700 ; 4th, when completed and accepted, \$2,550. Total, \$6,550. It was further provided that in each of the said cases, a certificate should be obtained and signed by the said architect. The complaint contained the following further allegations :

That the plaintiff duly performed and fulfilled all the

Schenke v. Rowell.

conditions and requirements of said agreement to be by him performed by the terms thereof.

That the plaintiff has requested the architect in said agreement mentioned to give the certificate mentioned in said agreement, but said architect unreasonably neglects and refuses to give the same.

That the defendants have duly accepted the work performed by plaintiff under and by virtue of said agreement.

Judgment was asked for \$550 which remained unpaid.

The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action.

Chauncey B. Ripley, for appellants.

Chambers, Pomeroy & Boughton, for respondent.

ROBINSON, J.—In contracts for the performance of work under the supervision of an architect, which, to entitle the contractor to payment for work done, not only requires its completion, according to the terms of the contract, but also its approval by a certificate of the architect to that effect, the performance of the work, and the production of the certificate are both prerequisites to any recovery. A formal approval and acceptance of the architect "would not relieve the plaintiffs from their agreement to perform the work according to the plans and specifications." (*Glacius v. Black*, 50 N. Y. 150.) While the architect's certificate is thus made essential, and is otherwise indispensable to any right of recovery, its non-production may be excused when withheld by *fraud or collusion, or in bad faith*. (*Thomas v. Fleury*, 26 N. Y. 26; *Barton v. Herman*, 11 Abb. Pr. N. S. 378.)

The requirement of such certificate being for the benefit and protection of the employer, he may, by some definite or expressive act, waive the necessity for its production. A mere allegation of his *acceptance* of the work done has no legal significance. Every thing done in the progress of the work contracted for, if known to or recognized by the employer, is to be deemed as accepted in part performance.

Schenke v. Rowell.

Notwithstanding any such allegation as is made in the present case "that the defendants duly accepted the work performed by plaintiff under and by virtue of said agreement," the complaint presents no suggestion that the entire work so performed was accepted *as a full compliance with the requirements of the contract*. Without this, no waiver of an architect's certificate of complete compliance (so far as it gave assurance of the fact) could be deemed to be made.

This action was brought to recover a part (\$550) of the last and final payment of \$2,550 which was to be made when the whole work was "completed and accepted," and it is true such completion and acceptance is alleged in these precise and general terms, but as to the certificate of the architect as to their final payment, that the work had been so completed "*in a good, workmanlike, substantial manner, to his satisfaction and under his direction*," as required by the contract, none such is alleged to have been given.

The certificate of the architect, so far as material, was indispensable to any recovery, unless withheld for *fraud or collusion* or *in bad faith*, but the allegation that it was so withheld "unreasonably" has never been accepted as a justification for its non-production. Every principle upon which the architect's determination and adjudication in this respect is deemed imperative under the contract, rejects such "unreasonable" action, as without the consideration of the parties or the obligation of their contract. The architect, so far as it commits any matter to his judgment, is accepted as an *umpire* between them. (*Smith v. Briggs*, 3 Den. 73; *Butler v. Tucker*, 24 Wend. 449; *Wyckoff v. Meyers*, 44 N. Y. 145.) And his mere refusal, when his own impartial judgment dictates it, confers upon the contractor no right of recovery, even if by other witnesses he should be able to maintain he had substantially performed the work. The best judgment of the architect upon the matter so committed to his determination, has been agreed upon as the test of performance, and neither party can reject or repudiate his certificate given on the one side, or his refusal to give it to the other, upon mere allegation or testimony tending to show

Schenke v. Rowell.

that his action has been "unreasonable." His entire refusal to act would throw upon the courts the duty of acting in his stead, but until divested of the powers as conferred upon him by the parties, by death, incapacity, resignation, or *refusal to act*, the parties have agreed to accept either his certificate or his refusal to certify to the work done by the contractor, as a final judgment between them. Under these considerations the complaint was defective in substance.

1st. The mere allegation of complete performance of the work did not confer any right of action for want of the architect's certificate.

2nd. This was not supplied by the averment that the architect had "unreasonably" refused such certificate.

3rd. The mere allegation that the defendants had duly accepted the work performed by plaintiff only by virtue of said agreement, added nothing in extenuation or avoidance of the necessity of such certificate without further allegation that such work was so accepted, not only in compliance with the contract, but was also received *as a full performance*. (*Glacius v. Black, supra*. 153.) The acceptance by the architect of any substitute for that which the contract called for, if substantially variant from its terms, could not be justified, (except through authority of the employer), nor can the acceptance by the employer of inferior or different work than such as was contracted for, be deemed or accredited as part or entire performance, except upon some new consideration operating between the parties. Any agreement to accept any such imperfect or incomplete work with deductions for defects agreed upon would be binding (*Glacius v. Black, supra*), but without it the idea that the mere declaration of an intention or purpose to waive any right or damages already accrued, is wholly unavailable as a defense thereto, or as against the assertion thereof. Under these circumstances, it follows that the complaint was defective in the foregoing particulars. The order overruling the demurrer should therefore be reversed, and judgment given for the defendants, unless the plaintiff, within twenty days from the service of a copy order to be entered hereon, amend his com-

Mahler v. Schloss.

plaint and pay the costs of the trial on the demurrer, and of this appeal (to be taxed by the clerk), and for failure to so amend and pay such costs, that defendants have judgment final.

CHARLES P. DALY, Ch. J., and JOSEPH F. DALY, J., concurred.

Ordered accordingly.

MORITZ MAHLER, Appellant, *against* MOSES SCHLOSS *et al.*
Respondent.

(Decided June 18th, 1877.)

The plaintiff took a bill of sale of goods, paying the price named therein, and executing a written agreement to return them at an advance specified, if the former owners desired to repurchase within two months, and, in that event, to pay over the proceeds of those sold meantime, less ten per cent. commission, and the testimony of the parties to the transaction was conflicting as to whether it was an absolute sale or a transfer as security for the sum advanced:—*Held*, that on the face of the instruments, in the absence of evidence going to show fraud on the part of the buyer, or undue inadequacy in the price paid, the transaction was in effect an absolute sale with a right to repurchase, and valid as against creditors levying on the goods under execution against the vendor, and that on the conflict of testimony, the jury should determine the character of the transaction.

The evidence as to the change of possession being in conflict,—*Held*, that, assuming that the vendor remained in possession, as was found by the jury, the plaintiff was entitled to go to the jury on the question of the *bona fides* of the transaction on his part.

The weight of the evidence on the question of the change of possession, considered.

An instruction to the jury by the judge at the trial, that "if it was a conditional sale, then it was void as against creditors,"—*Held*, error.

An instruction that if it was a mortgage, it was void for the reason that the creditors had the right to take the goods under the execution against the former owners, the goods being in the possession of the latter, and being to all intents and purposes theirs,—*Held*, erroneous, the questions of the character of the transaction, and of the plaintiff's good faith, not being submitted to the jury.

Mahler v. Schloss.

APPEAL by the plaintiff from a judgment of this court, entered upon the verdict of a jury, after a trial before Judge VAN BRUNT, and from an order made at special term by Chief Justice CHARLES P. DALY, denying a motion for a new trial upon the minutes of the judge at the trial, under the exceptions taken thereto.

The action was brought for the conversion of a lot of about 200 silk umbrellas.

The defendants justified under an execution in favor of the two defendants, Schloss (the marshal who made the seizure being joined as a defendant), against Francis Carlton and Cornelius C. Carlton.

It appeared at the trial that the plaintiff rented to the Carltons, doing business as F. Carlton & Sons, a portion of his store for the sale of umbrellas, upon a rental equal to one-tenth their gross sales, and subsequently a bill of sale of all their stock in his store was executed by them to the plaintiff, as of date July 1st, 1874, the plaintiff giving them in return a check for the sum named as the consideration in the bill of sale, and a written agreement in the following terms:

" New York, July 1st, 1874.

" Mr. M. Mahler agrees this day, if F. Carlton & Sons desire to repurchase the invoice of umbrellas and parasols dated July 1st, 1874, \$300, within two months from this date, Mr. M. Mahler will return to them at a profit of \$25, but whatever Mr. Mahler sells by the 1st of September, and amounting over \$325, he, the said M. Mahler, agrees to hand over to said Carlton & Sons, less ten per cent. commission on all sales.

"Signed, M. MAHLER."

On July 13th, 1874, the property in question was levied upon under the defendants' execution, the service of summons on one of the Carltons having been made June 22d, 1874, and judgment entered July 3d, 1874.

The plaintiff, as a witness in his own behalf, testified that the bill of sale represented an absolute sale; that no one other than himself had any interest in the goods, nor any

Mahler v. Schloss.

right to their possession, nor to the return of them under any consideration ; that his book-keeper made the purchase, but he was "partly present," "partly heard" the negotiation, and believed he heard the whole of it.

He further testified that Cornelius C. Carlton, with his brother, his only clerk, left his store on July 1st, 1874, and did not return; and that neither of them afterward did business there.

The defendant, Israel M. Schloss, called for the defense, testified that he saw Carlton's brother in the plaintiff's store showing umbrellas to customers in July, a day or two before the levy.

Cornelius C. Carlton testified for the defense that he borrowed the \$300 and gave the bill of sale as security ; that he had clerks in the store continuously up to the time of the seizure engaged in selling goods ; that he never was there much himself either before or after July 1st, 1874, and on cross-examination swore as follows :

" Q. When did you first go to Mr. Mahler's place to transact any business ?

" A. As I said [on direct], I believe it was about the 1st of June, or previous to that.

" Q. When did you leave there ?

" A. Well, I never was there, exactly, myself.

" Q. When did you leave there ?

" A. Well, I never was there, exactly, myself.

" Q. When did you leave there ?

" A. I never left there.

" Q. When were you in the store yourself for the last time ?

" A. After the sale had been made.

" Q. Were you there on the 1st of July ?

" A. Yes.

" Q. Every day between that and the time of the seizure ?

" A. No, never ; every other day I had people attending the store.

" Q. Were you there on the 1st of July yourself ?

Mahler v. Schloss.

"A. Yes.

"Q. Were you there the 2d of July?

"A. I could not say.

"Q. On the 3d?

"A. Possibly I was, and perhaps not. I never made a constant practice of going every day.

"Q. Is there one day between the 1st and the 13th of July that you can say you were at that store?

"A. Why, of course I might have been."

Question repeated.

"A. I could not positively say. I was there on the 1st I know, for this transaction refreshes my memory about it."

John McDonough, a defendant, and the marshal who made the levy, testified for the defendants that there were only 91 umbrellas seized. "Six of the commonest; one \$1 12½; then about two dozen sun umbrellas, at \$1 or \$2 at the outside; then some at \$3, with ivory handles; then some at \$3 50 and \$4; there were some five, six or seven regular rain umbrellas, worth about \$5, some \$4 75 and \$5 50. I believe they brought something near that price."

He further testified that he was present at the auction and bought four dozen and a half umbrellas himself, and that the sum total realized was \$106.

The other facts are stated in the opinion.

W. A. Beach, for appellant.

G. H. & B. F. Watson, for respondents.

ROBINSON, J.—It clearly, and without dispute, appeared on the trial that on and prior to June 1st, 1874, the plaintiff occupied a store at No. 849 Broadway, for the sale of articles of fur; that on or about that day he granted to one Cornelius C. Carlton, for the firm of F. Carlton & Sons, the right to use a part of the store with a front window for the sale of umbrellas, at a rent of ten per cent. upon their gross sales. On the 1st of July following, Carlton & Sons executed to the plaintiff, upon the expressed consideration of \$300, a bill of

sale of all their stock of umbrellas, consisting of seven dozen, at \$4 28½ each.

An instrument in writing was produced on the part of the defendants, which the jury might find from the testimony to have been executed at the same time by the plaintiff, or with his authority, and as part of the same transaction, granting said F. Carlton & Sons an option to repurchase the same invoice of umbrellas within two months for \$300, together with a profit to him of \$25; the proceeds of whatever he should sell by the 1st of September, amounting to over \$825, he was to hand over to Carlton & Sons, less ten per cent. commission on sales. While proceeding to sell umbrellas, the plaintiff added to the stock and purchased goods of that character to an amount (as he testified) of upwards of \$1,000, and after he had sold about half the stock so purchased from Carlton & Sons, the defendants, on an execution in favor of the Messrs. Schloss, seized and took away all the remaining stock of umbrellas, including such as had been purchased by the plaintiff after the transaction with Carlton.

The evidence presented by C. C. Carlton, in opposition to plaintiff's positive testimony denying that either he, or any one in his behalf, remained in possession of the business after July 1st, is of the most meagre and unreliable character, and could scarcely warrant any finding of such possession.

The testimony fails to show that the price paid by the plaintiff for the seven dozen umbrellas, was so inadequate as to even suggest that any unconscionable advantage was being taken by him of the Carltons' necessities.

The plaintiff denied any knowledge of the Carltons' insolvency, and even of their being embarrassed, and there is no shadow of testimony tending to show that he acted with intention to defraud the Carltons' creditors.

The defendants, therefore, could not, by force of their execution, assert any rights but such as could have been enforced by the Carltons.

The transaction, as evidenced by the bill of sale and counter-agreement, was of an absolute sale, with a right to

Mahler v. Schloss.

repurchase within two months upon the terms stated. It bore no feature of a mortgage, since no debt or obligation existed on the part of the Carltons for the \$300 paid to them for the umbrellas. (*Southworth v. Bennett*, 58 N. Y. 659.) It was not a *conditional* sale, but was on its face, at most, a sale with a right to repurchase. The legal effect of the agreement could not, as between the parties, or those claiming under them, be varied by *parol*, except it was shown to have been a mere device for usury. Being neither a mortgage nor a conditional sale, the property in the seven dozen umbrellas was absolute in the plaintiff, and for his agreement to resell, he was only liable as upon the executory agreement giving the Carltons the right of repurchase. Considering the absence of any testimony showing that the value of the umbrellas sold plaintiff exceeded the \$300 paid for them, it is difficult to understand how the question of usury could be made available to the defense in any aspect of the transaction.

Assuming, however, as claimed by the defendants, that notwithstanding this sale to plaintiff, the Carltons, through their clerks and agents, continued in possession, and that it was presumptively fraudulent as against the creditors of the vendors, the plaintiffs had a right to have the *bona fides* of the transaction submitted to the jury.

The judge erred in instructing the jury (aside from the question of possession) that "if it was a conditional sale, then it was void as against creditors." In no aspect of the law can such a proposition be maintained. A conditional sale is, in all cases, operative as against the creditors of the vendor, and because on *condition* no fraud on creditors can be imputed to, or necessarily inferred from, the transaction.

He also erred in charging that "if it was a mortgage it was also *void*, for the reason that Mr. Schloss had the right to take possession of the goods under the execution, they being in the possession of Mr. Carlton, and being to all intents and purposes his goods." In this connection plaintiff asked the judge to charge the jury "that if the jury should find that Carlton was in possession, this would only cast

Haviland v. Johnson.

upon the plaintiff the duty of showing that the transaction was free from fraud with reference to the creditors, as far as he was concerned." If the instrument was a mortgage the prescribed time for redemption had long since expired, and the *title* was absolute in the mortgagee. If the transaction was effectual as a sale as between the Carltons and the plaintiff (and that certainly was an issue to be determined by the jury), the question of the nature of the debtors' possession presented by the plaintiff was one that ought to have been distinctly stated and explained by the judge to the jury. His refusal to charge as requested was a distinct intimation to them that it was not a matter for their consideration. The exception was well taken.

The judgment should be reversed, and a new trial had, with costs to abide the event.

LARREMORE and J. F. DALY, JJ., concurred.

Ordered accordingly.

CARRIE HAVILAND, Respondent, *against* JOHNSON *et al.*
Appellant.

(Decided June 18th, 1877.)

The plaintiff received a sewing machine from the defendants under a written contract, by the terms of which she certified that she "hired it to use," and agreed to pay them a specified sum in advance, as security for its safe keeping, and to make monthly payments of an amount fixed, for twelve months thereafter, for the use of the machine, and upon default in any of the payments, to forfeit the machine and the security money. The contract also stipulated that she could at any time purchase the machine upon the payment of a sum, which, added to the security money, and the monthly instalments, should amount to a certain price. The security money was paid, as well as six monthly instalments, when a default was made, and the machine taken by the defendants, whereupon she sued to recover back the amount of her several payments. *Held*, that she could not recover the amount of the instalments, nor (DALY, C. J., dissenting) the amount of the original deposit.

Haviland v. Johnson.

APPEAL by defendant from a judgment of the Sixth District Court.

The facts are fully stated in the prevailing opinion.

Thatcher G. Waterman, for the appellant.

Hugh Coleman, for the respondent.

ROBINSON, J.—This action was probably intended to be instituted against the members of the firm of Johnson, Clark & Co., carrying on the business of selling sewing machines in this city. The Christian names of neither of the defendants, Johnson or Clark, is disclosed in any of the pleadings, while John Doe is evidently a myth, and it is not asserted his name is used instead of that of any unknown person. (Code, sec. 175.) An amendment might have been made during the progress of the action, but none appears to have been even suggested, and some embarrassment would arise in enforcing the judgment against Mr. Johnson, a nominal partner in the firm, or Mr. Andrew J. Clark, a resident of Orange, in the State of Massachusetts, two of the partners constituting the firm.

But aside from this, I am of the opinion that such errors appear in the return of the justice as call for a reversal of the judgment.

Plaintiff sued for "\$45 money on sewing machine," to which claim the defendants, assuming them to have been named, pleaded a general denial. She intended undoubtedly to claim a recovery of that amount, paid by her towards the purchase of such a machine, and which they detained from her. There can scarcely be any question but that she acquired possession of the sewing machine upon the terms embodied in an instrument in writing, which was thereupon signed by her in the name of "Mrs. Carrie May," and witnessed by John McQuade, in these words:—

"NEW YORK, Oct. 18th, 1875.

"This certifies that I, Mrs. Carrie May, have this eighteenth day of October, 1875, hired to use of Johnson, Clark

Haviland v. Johnson.

& Co., one home sewing machine, numbered 73,623, on the following terms and conditions, to wit:—I agree to pay into the hands of Johnson, Clark & Co., fourteen dollars, as security money for the good care and safe keeping of said sewing machine while in my possession. I agree to pay at the office of the said Johnson, Clark & Co., without any demand whatever being made therefor, for the use of said machine, five dollars every month ensuing, to date on the eighteenth day of each successive month, for twelve months. I also agree not to remove said machine from the premises, No. ——— street, nor sublet the same without the written consent of the said Johnson, Clark & Co.

“It is distinctly understood and agreed by me, that should I fail to make any one of the said payments at the time specified, or remove, or allow said machine to be removed, without the written consent of the said Johnson, Clark & Co., I hereby forfeit the said machine and the said security money paid by me, and the said Johnson, Clark & Co. may repossess themselves of said machine without notice, and I hereby authorize, empower and direct the said Johnson, Clark & Co., or their agents, to enter the premises wherever said machine may be, and take, and carry the same away, and in consideration of the foregoing easy terms, I do hereby waive my right in all existing laws to the contrary, and agree not to commence or undertake to commence, or sustain or aid in sustaining any legal action against the said Johnson, Clark & Co., or their agents, for any damage done to my person, or the persons of my family, or to my property, either leased or owned by me, in the recovery of said machine.

“I also certify that Mr. John McQuade, the identical person whose name is attached hereunto as a witness to this instrument, did read the same in an audible voice, within my hearing, and that I do fully understand the contents thereof, and agree to the same without any persuasion by any person or persons.

“Should I at any time desire to purchase said machine, said Johnson, Clark & Co. agree to sell the same to me upon my paying them an amount at any one time, which shall

include said security money and all moneys paid as compensation for the use of said machine, amounting in the aggregate to the sum of seventy-five dollars. Johnson, Clark & Co. do not agree to any terms or promises not fully stated in this lease.

“(Signed),

MRS. CARRIE MAY."

"Witness: John McQuade."

"Never gets out of order."

"Johnson, Clark & Co., 826 Broadway, New York; No.

Haviland v. Johnson.

of the instruments she signed ; that she simply understood she was purchasing the machine on these terms of warranty: " Warranted perfect, and if a part fails from any imperfection in five years, we (Johnson, Clark & Co.) will supply the part free of cost. This warranty does not include needles, shuttle, or bobbins." She attempts to repudiate these several agreements, signed by her, because (as alleged) she did not in either instance read them, and they varied from a simple contract for the sale and purchase of the machine. She nevertheless concedes that it was agreed that if she made default in the payment of \$5 per month, Johnson, Clark & Co. were to take the machine away. So that upon her own showing, and without consideration of the obligation of the contracts, which she actually signed, the sale even upon her own understanding was conditional, on the payment of \$5 per month towards the purchase money ; that for default in any such payment Johnson, Clark & Co. might reclaim the machine ; that such default actually occurred on the 18th of June, and they rightfully might retain the machine by reason of such default. There is no ground for the suggestion of plaintiff's counsel that the reiterated agreement was obtained through any fraud, because containing provisions inconsistent with a sale of the machine for \$75, payable in monthly installments of \$5, and on condition that Johnson, Clark & Co. might retake the machine in case of any default, as she conceded such to have been the terms as understood by her. The instruments were, on each occasion, presented to her for her signature, and she signed them, and her failure to read them as she might and ought to have done, without any subterfuge being resorted to, inducing her incautiously to omit to do what she was fully capable of doing, was without excuse, as the instruments were plainly printed and plainly intelligible. (*Mallon v. Story*, 2 E. D. Smith, 331 ; *Harris v. Story*, 2 id. 367 ; *Ellis v. McCormick*, 1 Hilt. 313.) This action was not to recover money paid through any false representation, nor for damages sustained through any breach of warranty as to the character of the machine, but upon some idea that although after two or three months trial of the

Haviland v. Johnson.

machine it worked "nicely," yet for subsequent imperfections becoming manifest during the five or six subsequent months that she used it, she had the right to wholly reject it, and recover what she had paid upon account of it. No such principle exists in the law. Her right to rescission of the contract by which the article sold was warranted, and which for two or three months worked "nicely," and which was retained and used for eight months, was merged in the warranty. (*Kiernan v. Rocheleau*, 6 Bos. 148; *Reed v. Randall*, 29 N. Y. 373.)

For breach of warranty she could only recover as damages what the article was inferior in value to what it would have been as warranted, and no proof was offered establishing any such rate of damages.

There was nothing shown which indicated that the defects of the machine, when taken for repair, rendered it wholly worthless, or were such that it could not again, at some trivial or certain expense, be made to work "nicely," as it had done previously. The measure of damages adopted by the justice in allowing the plaintiff the whole amount of \$45 she had paid upon the machine, was wholly untenable. Either, 1st. As any such as arose from any breach of the warranty; or, 2d. From any obligation of Johnson, Clark & Co. to repay plaintiff the moneys she had paid towards the purchase of the sewing machine, and from her being subject to the provisions of the agreement, under which she acquired possession of the machine, and which wholly abnegates her present right to claim a recovery for the moneys which she had paid thereon, either towards the purchase money, or as for rent for its use. The judgment should be reversed.

LARREMORE, J., concurred.

CHARLES P. DALY, Ch. J., dissented.

Judgment reversed.

Earle v. The New York Life Insurance Co.

**JOHN H. EARLE, Respondent, *against* THE NEW YORK
LIFE INSURANCE COMPANY, Appellant.**

(Decided June 18th, 1877.)

Whenever the purpose of a transaction by way of pledge or mortgage is satisfied, the right of the pledgor to the surplus becomes absolute.

An insurance company having, after the death of a person insured, settled with the pledgees of the policy by paying them the amount for which the policy had been deposited with them by the insured as security, and having, as part of the settlement, agreed to pay the surplus due on the policy to those lawfully entitled to it:—*Held*, that the assignee of the executor of the insured could recover in an action on the policy the amount of the surplus.

Such claim of the assignee,—*held* to be a purely legal claim for money due upon contract, which the insurance company was liable to pay in full to the assignee, without deduction for expense incurred by the company in resisting the unfounded claims of other persons to the money due.

APPEAL by the defendant from a judgment of this court, entered upon a verdict in favor of plaintiff, rendered at a trial before Judge JOSEPH F. DALY, and a jury, and from an order denying a motion for a new trial.

The facts are stated in the opinion.

Henry E. Knox and *S. R. Ten Eyck*, for appellant.

Raphael J. Moses, Jr., for respondent.

ROBINSON, J.—The defendants were insurers in the sum of five thousand dollars, upon a policy of life insurance dated in December, 1870, and issued by them upon the life of Daniel Ladd, a resident of the State of Florida, payable to his legal representatives in sixty days after due notice and satisfactory proof of his death. He died October 20th, 1872, and due notice and satisfactory proof of his death were given the defendants on the 19th of November, 1872, so that their obligation to pay the amount of the insurance money to the representatives of the insured, accrued on the 19th day of January, 1873. The insured left a last will and testament

Earle v. The New York Life Insurance Co.

which was duly probated, and letters testamentary were issued thereon to George Ladd, as executor, in a court of the State of Florida, on the 25th day of October, 1872. The interest thereby vested in said executor was afterwards, on the 7th of May, 1874, transferred to the plaintiff. On the 12th of October, 1871, the insured transferred said policy by an assignment in absolute terms to Duncan & Johnson, as collateral security for the payment of the sum of \$1,800, of which assignment and such special interest therein of Duncan & Johnson, notice was duly given the defendants, accompanying notice of the death of the insured. In February, 1873, Duncan & Johnson commenced an action in this court against the defendants for the recovery of said insurance money with interest from January 18th, 1873, which was on the 18th of April, 1873, settled by the payment to Duncan & Johnson of the sum of \$1,975, without costs, as their *interest to date, in the policy of insurance*, and defendants thereupon covenanted with them to pay the balance due on the policy, after deducting lawful expenses to such persons as were lawfully entitled thereto, and also to indemnify Duncan & Johnson from liability growing out of a garnishment thereof served on them at the instance of any creditors of said Daniel Ladd. This payment, plaintiffs claim, exceeded what was due Duncan & Johnson (\$1,800 and interest from October 20th, 1872,—\$63—\$1,863) by \$131 50, but it is clear, they had a right to exact from the defendants, by virtue of the absolute assignment, the whole amount due upon the policy, and if what they received exceeded what was due them, they, and not the defendants, are liable for the excess. But this recognition of their special interest in the moneys due upon the policy and liquidation of the amount they insisted upon receiving, in respect to it, coupled with defendants' covenant (p. 33) "to pay the balance which is due upon said policy of insurance, after deducting any lawful expenses therefrom, to such person or persons as shall be entitled to said balance," was a complete severance of the rights of Duncan & Johnson from such as belonged to the legal representative of Daniel Ladd, and

ensured the payment of such balance to his legal representative. Wherever the purpose of a trust or lien, by way of pledge or mortgage, is satisfied, the right of the owner, pledgor, or remainder-man to the residue or surplus, then becomes absolute (*Selden v. Vermilya*, 3 N. Y. 525), and plaintiff's right to a recovery of such surplus, after satisfaction of the claim of Duncan & Johnson and recognition of the settlement became perfect. The amount due at the time of this settlement, was (\$5,000 and interest for 4 months and 29 days, \$136 10—\$5,136 10, less \$1,975) \$3,161 10, and plaintiff was entitled to recover the same, unless divested of his interest, by some valid sequestration thereof, prior to the assignment, made to him by the executor of said Daniel Ladd, dated May 7th, 1874. In opposition to the plaintiff's claim as such assignee of the demand in suit, defendants present some proceedings in the State of Georgia, instituted by "Bernhard & Kayton," in November, 1872, against said George Ladd, executor, by way of attachment and garnishment, in the City Court of Savannah, being a mere notice directed to the defendants of garnishment, of a debt due by them to the legal representatives of Daniel Ladd, of what money, effect, property, real or personal, or evidences of debt, belong to said Daniel Ladd, in his life time, or to which his legal representatives had any claim, or to which they were entitled in the hands or possession of the defendants. No record of the proceedings upon which this notice of garnishment was issued is produced so as to entitle it to any consideration as a proceeding lawfully initiated and having any legal efficacy, but it is conceded such writ of garnishment was duly issued and served on the agents of the defendants at Savannah, on or about November 20th, 1872, and duly transmitted to the defendants at New Yale. It was also admitted that in November, 1872, the ordinary of Chatham county, in the State of Georgia, granted to Z. Falk authority to collect, gather, and keep together, the goods, chattels, and effects of said Daniel Ladd, *ad colligendum*, until legal administration thereupon should be granted. These proceedings were futile, as against the present claim.

Earle v. The New York Life Insurance Co.

The Civil Code of Georgia, providing for proceedings by way of attachment and garnishment (sec. 3277), which alone warrants such a proceeding against an administrator or executor of a deceased person for a debt due by him in his life time, only authorizes such process when a removal of the property of the deceased "without the limits of any county of the State" is attempted. This evidently has relation only to administrators or executors appointed by its local courts, and nothing beyond that is contemplated. No allusion is made to foreign administrators or executors authorized by courts of other States to take possession of assets of property of deceased persons who had resided out of such State. At common law, an executor was not authorized to sue, nor liable to be sued, in his official character, in any State or government but that from which he derived his authority (Wilkes, on Executors, 1614; Story, on Conflict of Laws, § 513); and there is nothing in the Georgia Statutes to which reference has been made (Civil Code, sec. 3288 to 3332) which indicates any innovation upon this principle of the Common Law. The attempt by any court of Georgia to garnish this claim existing in favor of an executor appointed by a court of the State of Florida against a corporation of *this State*, was of no effect. So, too, this claim being then held by Duncan & Johnson as collateral security, its garnishment was unauthorized by the laws of Georgia, as was held in *King v. Carhart* (18 Ga. 653), and authorities cited which are now contained in an enactment of its Civil Code of 1873 (§ 3551) in these words: "Collateral securities in the hands of a creditor, shall not be the subject of garnishment, at the instance of a creditor." This was upon ordinary common law principles, whereby the creditor became the legal owner of the debt, and was only bound to account as trustee to his debtor for so much as he realized after satisfaction of his claims upon the amount collected. So, too, the defendants fail to disclose how the claim could have been subjected to any proceedings to procure administration upon the estate of Daniel Ladd, or how the evidence offered on this subject was of

Earle v. The New York Life Insurance Co.

any legal efficacy as a defense. The defendants, after their settlement with Duncan & Johnson, were but debtors to the legal representatives of Daniel Ladd (whose rights are, without dispute, vested in the plaintiff) for the payment of the insurance money with interest, from January 18th, 1873, except as to the sum of \$1,975, which they paid Duncan & Johnson, on the 13th of April, 1873. That balance, with interest to the date of trial, amounted to \$4,128 31. No injustice has, therefore, been done the defendants by the verdict for \$3,874 50.

There existed no defense to the claim of the representatives of Daniel Ladd to this balance, and although the defendants have been harassed in defending themselves from pretensions or claims, made by parties that were in no way legally entitled to exact from them any portion of the debt owing by them, their expenses incurred therein through the employment of counsel for that purpose or otherwise, constitute no lien or equitable claim upon the debt owing by them against their *true* creditor. That obligation possessed no characteristics of an equitable character, but was a pure legal demand for so much money due and owing upon their contracts. No garnishment of the debt in the State of Georgia was shown that could have been of any validity, either as against the executor of Daniel Ladd or the present claim of plaintiff or his assignee. There are no other points suggested on the part of the defendants, which should affect the recovery.

Judgment and order should be affirmed.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Judgment and order affirmed.

Davis v. Davis.

MARY A. DAVIS, Appellant, *against* SAMUEL C. H. DAVIS,
Respondent.

(Decided June 25th, 1877.)

It is a general and universal law that all that is essential to constitute a marriage between parties competent to contract it, is their mutual consent to enter into the marital relation. This consent must be clearly expressed and made known, but no particular ceremony, or form of words, or cohabitation is essential to constitute the marriage. This general law will be presumed to be the law of any civilized country until a qualifying or restrictive law of that country is shown.

Where a form or ceremony of marriage has been proven, it is *prima facie* evidence of marriage, and the burden of proof to show that the form or ceremony did not include the necessary elements to constitute a marriage is upon the party disputing the marriage.

There is no rule of law that requires, in a civil action in which the issues are such that a determination adverse to a party will be an adjudication of the fact that he has committed a crime, the same amount and conclusiveness of evidence as would be required to find the party guilty upon an indictment for that crime.
Per VAN HOESSEN, J.

Admissions made by a party to an action of a fact within his knowledge and adverse to his interest are strong evidence and conclusive, unless there is other evidence in the case qualifying the admissions, or showing that they are erroneous; but the testimony of a witness that he has heard a party to the action make such admissions is weak and inconclusive evidence.

APPEAL by the plaintiff from a judgment of this court entered upon a dismissal of the complaint at a trial had at a special term of the court, without a jury, before Judge VAN BRUNT. The decision at special term is reported in 1 Abb. N. C. 140.

The action was for a limited divorce.

Judge VAN BRUNT on the trial found the following facts:

1st. "That in the month of October, 1869, the plaintiff and one J. M. Taylor were residents of the State of Texas, and under the age of 21 years.

2d. That on or about the 11th of October, 1869, the plaintiff, the said Taylor, and the sister of the plaintiff, who

Davis v. Davis.

was also the step-mother of the said Taylor, went from Texas into that part of the Indian Territory occupied by the Chickasaw nation, and visited the residence of an Indian preacher, who performed a marriage ceremony *per verba de presenti*, between the plaintiff and said Taylor.

3d. That the said Indian preacher said that he was not a regularly ordained minister.

4th. That the plaintiff and said J. M. Taylor never cohabited together as man and wife, and were never recognized as such by their friends and acquaintances.

5th. That the plaintiff and defendant were married on the 1st day of June, 1870.

6th. That at the time of the marriage of the plaintiff and defendant, the said J. M. Taylor was alive, and is now living."

From the foregoing facts he found, as a conclusion of law, "That at the time of the marriage of the plaintiff and defendant, plaintiff was the lawful wife of J. M. Taylor, and that therefore the plaintiff's case must be dismissed."

The plaintiff excepted to so much of the second finding of fact as found that a marriage ceremony, *per verba de presenti*, was performed between the plaintiff and the defendant by an Indian preacher in the Indian Territory, and also excepted to the judge's conclusion of law.

The evidence upon which the judge based his findings of fact, so far as it is essential to an understanding of the decision here, are stated in the opinion.

Edward D. McCarthy, for appellant.

John McKeon, for respondent.

CHARLES P. DALY, Chief Justice.—I cannot concur in the conclusion of Judge JOSEPH F. DALY, that the evidence of the marriage of the plaintiff with Taylor rests upon testimony of admissions of a character which is regarded in the law as weak and unreliable. Evidence of admissions is regarded as weak or unsatisfactory where it consists of what a third person, the witness, heard one of the parties say; for

Davis v. Davis.

the reason **that** such testimony is very easily fabricated, and even when honestly given, is **subject to the fallibility of** human memory, and because what was said may have been imperfectly comprehended, wrongly interpreted, or misunderstood. But when there is no doubt that the admission was made, there being an admission by the party to the action, who knew the fact, and especially where it is adverse to his interest, it is very strong evidence; and if there is nothing in the case to qualify or show that it was erroneous, it is very conclusive. Such is the case where a fact is sworn to in a deposition made by a party, or where the admission is given in evidence upon the trial, in the presence and hearing of the party to the action who made it, and he afterwards goes upon the stand as a witness and does not contradict it.

This is the nature of the admissions in this case. They consist, in the first place, of the direct evidence of the plaintiff herself as to what occurred on the occasion of her alleged marriage with Taylor, evidence of what took place in her presence, and in a matter in which she was a prominent and important party. So far from being weak or unreliable, it is the very best evidence of what was said and done in a matter of which there is no written memorial, and is especially entitled to weight, when it is given by the plaintiff in the suit and is adverse to her interest; which applies as well to the affidavit originally made by her as to the testimony given by her upon the trial.

The plaintiff's testimony shows that there was a marriage between her and Taylor. All that is essential to constitute a marriage between parties competent to contract it is their mutual consent to enter into the marital relation, expressed in such a way and by such acts as to leave no room for doubt upon the subject. No particular ceremony or form of words is necessary, nor is cohabitation essential to its validity. This is the public and general law, which will be regarded as recognized and prevailing in every civilized country, unless it is shown to be qualified or restricted by the law of the particular country. (*Fenton v. Reed*, 4 Johns. R. 52; *Jackson v. Winne*, 7 Wend. 47; *Caujolle v. Ferrie*, 23 N. Y.

Davis v. Davis.

106; *Connolly v. Woolrich*, S. C. 11 L. C. J. p. 197; 3 C. L. J. p. 14 [1867]; on appeal, 1 R. L. [Revue Legale] p. 253 [1869]; Swinbourne on Spousals, 8, 55, 74, §§ 3, 10, 11; Bishop on Marriage and Divorce, §§ 66, 67, 68; Shelford on Marriage and Divorce, 27.)

The plaintiff in her affidavit says that the form of a ceremony of marriage was gone through with on the 11th of October, 1869, between her and Taylor, in the Indian Territory, within the territorial limits of the Chickasaw tribe, in the cabin of a resident in the Indian country; that she was then about 20 years of age, and Taylor was about the same age; that they gave fictitious names; that she did not suppose it to be a binding contract, or intend that it should be; that they were then both living at Bonham, in the State of Texas, and that the ceremony was performed in the Indian country, so that it should not be a contract or valid obligation on either party. That she was induced to do what she did by her sister, who was married to the father of Taylor; that she was told at the time, and believed, and still believes, that no marital obligation was incurred by the ceremony; but that afterwards, recognizing that the act was one of folly on her part, and might entail serious consequences, she applied for and obtained, in the Indian Territory, a dissolution of the contract.

In her oral testimony on the trial, she said that she did not intend by that ceremony to become Taylor's wife; that the ceremony was performed by a half-breed, who was not an ordained minister, but preached at times; that he wore no clerical vestments, and gave no certificate of the marriage; that upon this occasion she went with her sister to the Red River to get some fruit, and did not know that they were going into the Indian Territory; that her sister and she went in a buggy; that Taylor rode a horse, and that they met him at the river; that they crossed the river and went to the cabin which she supposes was the one where the minister lived; that her sister had often spoken to her about marrying Taylor; and after they got into the cabin, asked her if she would promise to marry him in two years, in case of her

Davis v. Davis.

(the sister's) death ; and that the plaintiff said to her that she would. That her sister then asked her if she would promise before witnesses, and that she replied that she did not think that her sister had any cause to doubt her word ; that the sister said she would not ask her in Bonham, because people would talk about it, and that she replied that her (the plaintiff's) promise was as good in one place as in another ; that her sister talked a while with the preacher, and he then asked if she would promise to marry Taylor, and if he would promise to marry her ; that she did not say any thing, and that she did not believe he said any thing ; that she was very close to him and heard nothing from him ; that she could not take oath whether the preacher then declared them man and wife. She was asked, " Will you swear that he did not ? " and her answer was, " I cannot take oath to that either. " She was asked, " Will you declare whether you were married or not ? " and answered, " To the best of my knowledge and belief I don't think we ever were. " The question was then put, " This ceremony was gone through ? " and her answer was, " I have made my statement. " The further question was put, " For what purpose was it gone through ? " and she answered, " Perhaps you had better ask my sister ; she may know. " The question was repeated, " What was it gone through for ? " and she answered, " I know nothing more. " The question being persisted in, she said, " I don't know any other reason only she didn't think she would live long, and in case of her death she wanted I should have her child ; and without she should die, she didn't think or expect us to be married. " The further question was put, " Did *she not want you to marry him at that time ?* " and she answered, " *Yes.* " She said that the preacher told them that he preached to the natives, but that the natives (the Indians) could not be married by him, as he was not an ordained minister ; and it appeared in the case, that by the laws of the Territory, all marriages in the Indian nation had to be solemnized by a judge, or by an ordained preacher of the gospel.

Her further testimony was : " After the ceremony we went back to Bonham, in Texas. We immediately left the

Chickasaw nation. Taylor and I separated as soon as we got home. We never lived together as man and wife. Neither acknowledged the other as married. We were never acknowledged as man and wife, either publicly or privately. I subsequently obtained a divorce from the obligation of the ceremony."

There are two things here admitted by the plaintiff: 1st. That her sister wanted her to marry Taylor at that time; and 2d. That a form of a ceremony of marriage was made between her and Taylor at that time. In respect to the latter fact, I quote her own language from her own affidavit. What form was gone through with by the half-breed preacher does not fully appear; but that is not material. Her admission that a form of a ceremony of marriage took place was *prima facie* evidence of a marriage, and the obligation was not upon the defendant to prove what the clergyman said or did, but upon the one whose interest it was to dispute the marriage. (*Fleming v. The People*, 27 N. Y. 335.) She went with her sister and Taylor to the preacher's cabin and allowed the form of a ceremony of marriage, in her own words, "to be made" between her and Taylor, knowing perfectly well what she was doing; for she was then a widow and a mother. She says that they gave fictitious names, but that, I apprehend, would not render the marriage invalid. What constitutes a marriage, as I have said, is the mutual consent of the parties to enter into the marital relation; and that these parties did consent to do so, is shown by their going voluntarily to the cabin of the preacher and having a marriage ceremony performed; by having what, by all fair intendment, it must be assumed the half-breed preacher regarded and meant to be a marriage ceremony. There is nothing in her testimony to show that Taylor did not so regard it. All that she says in respect to him is, that she did not hear him make any response to the preacher's question whether he would promise to marry her, and she would promise to marry him, in respect to which it is sufficient to say, that although there may have been no response in words, acquiescence on his part and on her part could be expressed simply by an

Davis v. Davis.

inclination of the head. Although they all went to the preacher's cabin to have a marriage ceremony performed, and waited for the preacher until he came home, she said that she did not intend it should be binding. What a party intends is inferred from his or her acts, and where the act is plain and unequivocal, especially in matters of contract or mutual undertaking, a party cannot avoid the effect of it by any mental reservation or secret intention. If there had been an understanding between the plaintiff and Taylor that they would go into the Indian country and go through the form of a marriage ceremony merely for the purpose of leading plaintiff's sister to believe that their intention was to be married, whilst in reality they had no such intention, but on the contrary, a mutual understanding that they would not and did not mean to enter into the marital relation, then in the absence of cohabitation or of any subsequent acts indicating the existence of the relation of man and wife, there might be some ground for claiming that what took place was not in fact a marriage, but a piece of deception, intended for a particular purpose. (*McClurg v. Terry*, 21 N. J. Eq. R. [6 C. E. Greene], p. 225.) But there is nothing in the evidence to show, or from which it can be inferred, that there was any such understanding on the part of Taylor. She says in her affidavit that she did not intend that it should be a binding marriage contract, and that "neither did the other party intend that it should be;" but neither in her affidavit nor in any other part of her testimony does she give any thing he said to warrant her drawing any such conclusion; all that she says in addition being, "I think I had a knowledge of his intentions." On the contrary, so far as respects his acts, he voluntarily submitted to the performance of what was meant to be a marriage ceremony, and in his own family, or at least by his father, it was understood that he had been married to the plaintiff, for the father told the witness Upson that the plaintiff was married to his son before she married the defendant. If the plaintiff had been a young and inexperienced girl, the inference might be drawn that she was possibly unacquainted with a marriage ceremony and ignorant of the

Davis v. Davis.

effect of ~~what~~ she did and consented to. But she had been married four years previously in San Antonio, in Texas, to William H. Vance, who died about six months before the ceremony was performed between her and Taylor. She was therefore acquainted with the nature of a marriage ceremony and its effect, and no inference founded upon her ignorance can be drawn in her favor. She says in her affidavit that the ceremony was performed in the Indian country, rather than in Texas, so that it should not be a contract or valid obligation on either party, and yet in her oral examination upon the trial, she says that she did not know that she was going into the Indian Territory. She admits that her sister had been for some time desirous that she should marry Taylor, and that she wanted her to marry him at the time when they were in the cabin of the preacher and before the ceremony was performed. Her sister therefore could not have been a party to the understanding that they went into the Indian country, that it might not be a contract or valid obligation, as it was not carrying out her wishes to have a ceremony performed that amounted to nothing, and the plaintiff has not stated any thing that Taylor said to her or to anybody else to show that he was a party to any such understanding.

The fact that she and Taylor separated after the ceremony was performed, and neither acknowledged the marriage publicly or lived together thereafter as man and wife, is explained by the fact, that it was the intention of the parties to keep the marriage secret, as appears by the plaintiff's admissions to the witness Upson; testimony entitled to be received unhesitatingly as true, as the plaintiff heard Upson's deposition read upon the trial, had her attention called to it when she was a witness, and having the opportunity to do so, did not contradict it.

Upson testified that he told her in 1873, that Taylor's father had told him that she was married to his son before she married the defendant, Davis; that the father said to him that a few months after the death of her first husband, Vance, the plaintiff came up to Bonham and went from thence over into the Indian nation and was there married to

Davis v. Davis.

his son ; that he, Upson, asked her of this was true or false, and that she answered, " Yes, it is true ; but I don't know what business Bob Taylor had telling of it, and I don't believe that marriage was good for any thing any way, as we married under assumed names ; neither of us gave our correct names. . . . I only married Taylor to please sister Pomp. Pomp kept at me and insisted upon my marrying him (Taylor), and would give me no peace until I did." That she further said that her sister Pomp went with her to the Indian nation *and saw them married*, and that after they were married, she said to Pomp, " I hope now you are satisfied ;" that in the same conversation she stated that she went to the Indian nation to marry, so that it might be kept a secret and not found out.

This witness, Upson, had been intimate with her and her former husband Vance, and had married a member of the same family. His deposition was read upon the trial before the plaintiff was examined as a witness. She heard it read, remembered it when she was examined, and said in her testimony that there was some conversation between herself and Upson—something to the same effect as the one (the conversation) in her affidavit read the previous day. There is nothing in her affidavit about Vance, or respecting any conversation had with him, so far as that affidavit was read upon the trial, and in no part of her testimony does she deny that she made the statement to Upson which he swears she did ; nor does she deny any part of it. So that the judge was justified in believing that she made the statement to this witness as he detailed it, and the judge had the right to contrast her statement then with her testimony upon the trial, and draw his own conclusions as to which was the more credible ; a conclusion with which we ought not to interfere, as he had the advantage of seeing her and hearing her give her testimony.

Whilst she says in different parts of her testimony that they gave " fictitious names," " assumed names," and " did not give their correct names," she nowheres states what names they gave, and for all that appears, there may have

been merely a change in the Christian names or some other slight alteration or modification made in furtherance of the object which she told Upson caused them to go into the Indian Nation to marry, namely, that the marriage "might be kept a secret, and not found out." Where it is shown that parties went before a clergyman to be married, and had a marriage ceremony performed by him between them, it does not invalidate the marriage that they did not give their correct names, or concealed their proper names for some purpose of their own. It may have been a reason for keeping the marriage a secret, that her husband had been dead but for six months. Her sister appears to have been apprehensive that she (the sister) would not live long, and in case of her death she wanted the plaintiff to have her child. She was consequently very urgent for the marriage. The plaintiff says: "She insisted upon my marrying him, and would give me no peace until I did." But though the sister was urgent, and she was willing to marry Taylor thereafter, she was reluctant to marry him then, the reason of which, I think, is indicated by what her sister said to her; that she would not ask her to marry him in Bonham, in Texas, where they resided, "because people would talk about it," and very naturally, her husband having been dead but for a short time. It was probably, therefore, to avoid the gossip and comment that would have followed; that whilst she complied with her sister's urgent wish, the course was adopted of going into the Indian Nation to have the ceremony performed. The departure by separate routes, then meeting at Red River, then omitting to give their correct names, then separating as soon as they got home, all appear to have been precautionary measures to secure secrecy; that the fact of the marriage might not be known in Bonham, until they thought proper thereafter to make it public.

Two months afterwards she met the defendant at San Antonio, in Texas. Two months after she became acquainted with him, she applied for, and, as she says, obtained a dissolution of the contract in the Indian Territory—a fact not established upon the trial by the necessary proof—and two

Davis v. Davis.

months after that she married the defendant at San Antonio.

It is very evident from these facts, that though, at the request of her sister, she voluntarily married Taylor, she was desirous afterwards of marrying the defendant and of abrogating this previous marriage, which had never been publicly acknowledged, or followed up by their living together as man and wife.

Society is too deeply interested in the institution of marriage to allow it to be trifled with in this way; to recognize the right of one of the parties to abrogate it and marry again, because the names were not correctly given to the clergyman who performed the ceremony, or concealed for purposes of their own at the time. In other words, where two parties, competent to contract marriage, deliberately go before a clergyman, or, as is the case, a preacher, and have a marriage ceremony performed, they are, by their own voluntary act, married, and by the laws of civilized countries, or at least by our laws, neither can afterwards evade or get rid of the obligations at his or her mere will or volition. It in no way affects the validity of the marriage, that it took place in the Indian Territory. (See *Connolly v. Woodbridge*, *supra*.) The laws of the Indian Territory are designed for the government of the Indian residents of the Territory, and by treaty non-resident whites are exempt from their operation. (Art. 7, Treaty of 1855.) So far as we know, it would have been a valid marriage, had it taken place in Texas, if the validity of the contract is to be determined by the law of the domicile of the parties.

I see no ground for reversing the judgment of the court below, and, in my opinion, it should be affirmed.

VAN HOESSEN, J.—If instead of seeking alimony from the defendant, the plaintiff were now attempting to prove herself to be the wife of J. M. Taylor, there is no court that would not pronounce in her favor, upon proof by others of the facts to which she herself swore upon the trial of the case. It is true that the plaintiff swears to a secret intent upon her part not

Davis v. Davis.

to contract a marriage that would impose conjugal duties upon her from the moment of its solemnization, but the events and circumstances which she describes, if not explained away by the account she gives of her privy purpose, would establish beyond controversy or question that J. M. Taylor married her in the Indian Territory after making a journey thither from Texas, with no other object than to make her his wife. The marriage would be binding upon Taylor. An effort is made to show that it is not binding upon the plaintiff.

I deem it unnecessary to restate the evidence which led Judge VAN BRUNT to the conclusion that the marriage between the plaintiff and Taylor was valid and binding upon both parties. It is sufficient to say that the facts stated by him show strong if not conclusive reasons for the judgment which he rendered.

It is objected, however, that the only proof of the marriage of the plaintiff and Taylor consisted of admissions made by the plaintiff; that admissions are entitled to but little weight, and that the value of the admissions in this case is impaired by the consideration that a legal conclusion is indissolubly bound up with them. None of these objections has, in my opinion, much weight. It is a truism that the value of admissions depends upon circumstances. They are certainly not weak evidence when made by a person of acuteness and understanding, who, reluctantly, and with a clear perception of the danger of making them, is compelled to reveal a little of a story which he desires to withhold. The plaintiff in this case is a woman of mature years, whose wits have been sharpened by commerce with the world. Her testimony, given at the trial, shows that she knew perfectly well the weak points of her case as well as the strong ones. She had no alternative but to admit the matters which she had once sworn to in an affidavit, and which she had previously communicated to Upson, whose testimony was in the defendant's hands. She was not betrayed into an indiscreet utterance. Her admissions are to be reviewed, therefore, as we should regard those of a ripe and adroit man of the world. The legal conclusions she may have expressed are, of course, of no

Davis v. Davis.

value, but the facts which she admitted should have as much weight as if they had been established by the testimony of well-informed and unimpeached witnesses. Those facts are collected by Judge VAN BRUNT, and they form the basis of his opinion. It was undoubtedly competent for the judge to separate the wheat from the chaff in the testimony of the witness, and to draw his own conclusions from, and to place his own construction upon, the circumstances which she detailed. If those circumstances satisfied him that when she went to the Indian Territory she intended to marry Taylor, that she waited in the cabin for the preacher's return, that she stood up by Taylor's side to carry out the object which brought her from her home to the dwelling of the preacher, the judge was under no obligation to give credit to the statement that, in her breast she harbored, at that time, the secret intention not to be Taylor's wife unless her sister Pomp should die, nor was he bound to adopt her views as to the invalidity of a marriage under false names. It was proper for the judge to consider whether another marriage ceremony was contemplated in the event of Pomp's death, or whether instead of being a mere betrothal the ceremony performed was not, in the estimation of both parties, a binding marriage contract, to be kept secret for two years unless Pomp should die before that period had passed. I see no reason for differing from the learned judge in his conclusion. I am convinced that the plaintiff's intent was to marry Taylor. The circumstances she admits outweigh her denial of intent. It is contended that the judge was not warranted in finding that the marriage of the plaintiff with Taylor was valid unless the evidence of marriage was sufficient to convict the plaintiff of bigamy. I think there is no such rule. There was at one time an impression that where the issue of a civil action involved the question as to whether or not a crime had been perpetrated, the jury were not at liberty to find a verdict, the effect of which was to show their belief that the crime had been committed, unless the evidence would have warranted them in finding the suspected party guilty on an indictment for the same offense. (*Thurtell v. Beaumont*, cited in 2

Mowry v. The World Mutual Life Insurance Co.

Greenleaf's Evidence, sec. 408.) That is not now the law. (May on Insurance, sec. 583; May's edition of Greenleaf on Evidence; Albany Law Journal, vol. 15, page 444.) The judge was justified in deciding upon a preponderance of evidence that the plaintiff had married Taylor.

Great weight is claimed for the fact that the plaintiff swears that her marriage with Taylor was never consummated. If that evidence were given by any other person than the plaintiff, it might, under some circumstances, be of some importance; but I think this case presents no exception to the rule, founded upon the soundest reasons, that neither of the wedded pair can testify as to non-intercourse. (*Rex v. Luffe*, 8 East, 193; 1 Greenleaf's Evidence, sec. 253.)

The judgment should be affirmed.

JOSEPH F. DALY, J., dissented, and was for reversing the judgment and ordering a new trial, on the ground that the evidence was not sufficient to justify the finding as to the former marriage of the plaintiff.

Judgment affirmed.*

DANIEL A. MOWRY, Jr. Appellant, *against* THE WORLD
MUTUAL LIFE INSURANCE COMPANY, Respondent.

(Decided June 25th, 1877.)

A recognition and ratification by an insurance company of the acts of one who solicits for it a risk and fills up an application for insurance, establishes his relation as agent of the company, in respect to such acts, and any errors or omissions of the agent in the course of such acts are the errors and omissions of the company.

Where the answer of the insured to the question, in the application for a policy, "Occupation? Please state definitely," was "Man'g."—*Held*, that a breach of warranty was not shown by proof that the insured, at the time the answer was

* An appeal was taken to the Court of Appeals, but subsequently abandoned, the Supreme Court of the United States having made a similar decision in the case of *Meister v. Moore*, 6 Otto, 76.

Mowry v. The World Mutual Life Insurance Co.

given, was keeping a billiard saloon, though he had for years previous been a manufacturer of soda water, and was about to resume that business.

Where the assertions of the insured in his application for a policy were, that he had not, during the last ten years, had any sickness or disease, and had not employed or consulted a physician for himself:—*Held*, that a breach of warranty was not shown by proof that within a year previous to the application a physician had given the insured advice and medicine, it not appearing whether either the advice or medicine were for the insured personally or for his family.

Where a breach of warranty is relied upon by an insurance company as ground for forfeiting the policy, the warranty is to be strictly construed against the company.

APPEAL by the plaintiff from a judgment of this court in favor of the defendant, entered upon a dismissal of the complaint granted by the court at the close of the trial before Judge JOSEPH F. DALY and a jury.

The action was brought to recover upon a policy of insurance upon the life of Nelson H. Mowry.

The answer set up as a defense that the application for insurance formed part of the contract of insurance, and that there were breaches of warranties in that there had been false answers given to various questions in the application.

Upon the trial it appeared that William T. Shepley and John Shepley, who were engaged in business together as insurance agents for various insurance companies, had together solicited Nelson H. Mowry to insure his life; that William T. Shepley wrote in some of the answers to the questions in the blank application in the absence of the parties who were supposed to have answered them, and that his name was indorsed on the application as "agent;" that John Shepley took from the defendant the receipt for the premium, countersigned it as agent, and delivered it to Daniel A. Mowry.

The court dismissed the complaint at the close of the evidence, holding that the evidence showed a breach of warranty as to the occupation of the insured, and as to his consulting a physician.

The plaintiff's counsel asked to have the question of the agency of the Shepleys who, it was alleged, solicited the policy, submitted to the jury, and also whether or not there

Mowry v. The World Mutual Life Insurance Co.

were any misstatements or concealments of facts in the application, whether or not they were material, and whether the declarations in the application were warranties, go to the jury, but was refused, and took exceptions.

Julien T. Davies and *James McNamee*, for appellant.

W. P. Prentice, for respondent.

LARREMORE, J.—The plaintiff appeals from the judgment entered in this action dismissing his complaint with costs. He sued upon a policy of insurance issued to him by the defendant, March 3d, 1868, upon the life of Nelson H. Mowry, who died April 8, 1868, after a short illness. The application for insurance contained the usual inquiries as to the occupation, health and habits of the insured, upon which breaches of warranty were alleged, and claimed to have been established on the trial.

Some time prior to March 3d, 1868, John and William T. Shepley (life-insurance agents) solicited the Mowrys to take out a policy in the company defendant. On February 29th, 1868, a blank form of application for insurance was signed by the applicants, which was subsequently filled up by William T. Shepley. This application, upon which was indorsed "Agent, W. T. Shepley," was taken by John Shepley to the defendant, who accepted the risk, issued the policy, and gave the premium receipt to him, who countersigned it as agent, and delivered it to plaintiff.

The relation of the Shepleys to this transaction is an element of importance in the decision of this case. They solicited the insurance for the World Company, filled up the blank application upon which one of their names was indorsed as "agent," received the premium, and delivered the policy. Although no express authority of their agency for the defendant was shown, a recognition and ratification of it would be sufficient. (*Curtis v. Leavitt*, 15 N. Y. 47; *Bennett v. Judson*, 21 N. Y. 238; *Meehan v. Forrester*, 52 N. Y. 277; *Plumb v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y.

Mowry v. The World Mutual Life Insurance Co.

392; *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52; *Shaft v. Phoenix, etc., Ins. Co.*, 8 Hun, 632; *Rowley v. Empire Ins. Co.*, 4 Abb. Ct. of App. Dec. 131.) It is evident that if such agency existed, an error or omission of Wm. T. Shepley, in filling up the application for insurance, would be the act of his principal.

The first alleged breach was the representation as to the business of the deceased, viz. :

"Occupation—Please state definitely.

"Ans.—Manufacturing."

Defendant contends that the falsity of this statement is shown by the fact that in February, 1868, the deceased kept a billiard saloon. But it was also shown that for years previous he had been engaged in manufacturing soda-water, and in pursuance of an agreement between himself and the plaintiff, dated February 4th, 1868, was about to resume the same business.

If the question had been "*present* occupation—please state definitely," the breach would have been undoubted; but the deceased may have understood the question as referring to his usual, and not his temporary occupation.

In the case of *Dilleber v. The Home Life Insurance Co.*, in the Court of Appeals (69 N. Y. 256), Judge Earle says: "Fraud may be predicated upon the suppression of truth, but warranty must be based upon the affirmation of something not true." Besides, the answer, "manufacturing," conveyed no definite idea of the actual business of the applicant. Whether it was hazardous in its nature or not, appeared to be of little consequence to the insurer, for the answer was accepted without further inquiry. (*Fitch v. American, etc., Ins. Co.*, 59 N. Y. 572.)

The alleged breach of warranty, as to the statement in relation to the intemperate and habitual use of alcoholic stimulants, was a question for the jury.

The remaining breach relied on, was that affecting the health of the insured, and the employment and consultation of a physician. The insured, to the question "Has the party had, during the last ten years, any sickness or dis-

Mowry v. The World Mutual Life Insurance Co.

ease?" answered "No;" and to the question "Have you employed or consulted any physician, for yourself or your family—Please answer this yes or no." Ans.—"None for myself." The only testimony to support the breach of warranty, is that of Dr. Samuel Mowry, who testified: "By reference to my books, I find I gave N. H. Mowry advice and medicine on Dec. 21st, Dec. 26th, and Dec. 30th, in 1867."

There is no proof of any special sickness or disease, nor that the advice and medicine were for the personal benefit of the life-insured. It may have been, as the answer "none for myself" would imply, for a member of his family.

The defendant must be held to a strict construction of a warranty, the breach of which works a forfeiture. *Dilleber v. Home Life Ins. Co. (supra)*, and cases cited. Another view is suggested at this point. If Shepley's agency for defendant be established, then before the alleged misrepresentation can be assigned as a breach, it must appear that the disputed question was directly asked and answered. Where is the evidence that Shepley interrogated the insured as to sickness and medical advice? The proof is that Shepley was in haste to go to Boston, and filled up the blank application after he arrived there. He "did not ask any of the printed questions on the first page," but took a minute of every thing at the time. On his re-direct examination he is not positive about taking a minute.—"I might, in this case, being in a hurry, have neglected it."—Here is a wide margin for doubt as to his accuracy and carefulness in the transaction, and if the defendant has ratified the act, by accepting his services, it must not complain if it be estopped by his errors.

The case is one for a jury, upon the questions of agency and breach of warranty, and the judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

CHARLES P. DALY, Ch. J., and ROBINSON, J., concurred.

Judgment reversed, and a new trial ordered, with costs to abide event.

Westerfield v. Radde.

JOSEPH H. WESTERFIELD *et al.* Respondents, *against*
WILLIAM RADDE *et al.* Appellants.

(Decided November 5th, 1877.)

The president of a manufacturing corporation, organized under the act of 1848, cannot lawfully bind it in the purchase of goods required in its business, when a resolution forbidding such act on his part exists, and appears on the books of the corporation, even if the seller of the goods had no notice of such resolution, unless through a well recognized general course of dealing such president has been permitted and held out by the corporation as possessed of authority to make such purchases.

APPEAL by the defendants from a judgment in favor of plaintiffs, entered upon a decision of the general term of the Marine Court of the city of New York, affirming a judgment entered upon a verdict in that court at a trial term.

The plaintiffs, Westerfield and others, brought this action against Radde and others, as trustees of the Paragon Match Company, a manufacturing corporation, organized under the general statute of this State of 1848, to recover of them the price of merchandise, alleged in the complaint to have been sold and delivered by plaintiffs to that corporation, on the ground of the failure of the trustees to file their annual report as required by statute.

The complaint alleged that plaintiffs had recovered judgment against the corporation for the price of the merchandise, and that an execution thereon had been returned unsatisfied.

On the trial, the plaintiff gave evidence that the merchandise was bought by the company through one Bock, a trustee and the president of the corporation, that a part were delivered and used by the company, and that Bock was authorized, by a resolution of the trustees, to buy the merchandise. This evidence was in part the testimony of Bock, who, however, testified that he remembered "the

Westerfield v. Radde.

transaction," because one of the members of plaintiffs' firm "refused to give credit to the company," and his testimony in other particulars was directly contradicted by the testimony of Radde. It was shown on the trial that one of the by-laws provided that no officer, trustee or employee of the company should have power to incur any debt to the charge of the company, unless he be so authorized by the board of trustees, by a resolution duly entered upon the minutes of the meeting of said board. It was also shown that at the first meeting of the trustees, May 4th, 1872, the following resolution was passed: "On motion it is ordered that the company do not commence actual operations before the 1st day of June, 1872, or until an amount deemed sufficient for the successful commencement of operations shall be in the hands of the treasurer."

The court directed the jury to find a verdict for the plaintiff. The defendants excepted and asked the court to submit to the jury the question as to whether any, and as to how much of the merchandise had been delivered to the company. This request was refused, the court holding that the preponderance of evidence was so great that a verdict for defendants would be set aside.

The jury found a verdict for plaintiffs.

John A. Foster, for appellants.

Jno. P. Reed, jr., for respondents.

ROBINSON, J.—Plaintiffs sued the appellants, Radde & Koehler, and two others, as trustees of a corporation formed under the general manufacturing act of 1848, known as "The Paragon Match Company," for goods sold and delivered that company between May 29th and June 27th, 1872, by reason of the alleged failure of the company to make and publish the report required by the 12th section of that act. The company was organized in April, 1872, with seven trustees, including the two defendants. The by-laws prescribed that no officer, trustee or employee should have power to

Westerfield v. Radde.

incur any debt unless authorized by the board of trustees, by resolution entered in its minutes. The company was intended to succeed to the business of the firm of "Bock, Schneider & Co.," match manufacturers, whose assets and good will were purchased and were to be paid for, part in stock and part in cash derivable from sales of stock. It was also resolved by resolution passed May 4th, that the company should not commence actual operations before the 4th of May, 1872, nor until an amount deemed sufficient for the successful commencement of operations should be in the hands of the treasurer. The company was organized in June, and Mr. Bock, one of the trustees, was elected president. At a meeting held by five of the directors in the early part of December, 1872, all of them, including these defendants, resigned. The default charged, was for not making the report required by the act in January, 1873. The judge before whom the cause was tried, upon the proof tending to show a sale and delivery of the goods for which the action was brought upon the order of said Bock, held (against objection and exceptions) that the president of such a corporation could lawfully bind it in the purchase of goods required in its business, notwithstanding there was a resolution to the contrary on its books, unless the plaintiffs had notice of such resolution.

Bock, the president, had, as member of the firm of Bock, Schneider & Co., Bock, Genin & Co., and until such assumed organization, purchased goods of plaintiffs, and he expressly swore plaintiffs refused to give credit to the company. The refusal of the judge, therefore, to submit to the jury the question of the sale and delivery of the goods to the company, and as to the delivery of all the goods for which claim was made, was erroneous. The judge also erred in holding that the president of such a corporation "could lawfully bind it in the purchase of goods required in its business, notwithstanding a resolution to the contrary on its books, unless the plaintiffs had notice of such resolutions." As president he was but presiding officer of the board of trustees. The concerns of the company was to be managed

Westerfield v. Radde.

by the trustees, who were to be, by the articles of incorporation, "not less than three nor more than nine." The authority to contract a debt or transact any other business of the corporation, except such they specifically authorized by resolution or by-law, must grow out of some delegation of their authority, either by by-law or resolution, or through a well recognized general course of dealing, by which some person has been permitted and held out by the corporation as possessed of authority to transact its business. (1 Wend. 31; 1 Hun, 202; 3 Bosw. 600.) Under the views previously expressed, various other errors occurred in the admission of improper testimony—in admissions made by Bock, personally and in writing.

The status of these defendants when the alleged default of the corporation occurred, as two out of seven trustees fixed in number by the articles of incorporation, was admitted by their answers, no questions arising out of their previous resignation as well as the others of the trustees, or as to their power as a minority of such as was required by the articles of incorporation to transact any business of the corporation, or as to their exemption from responsibility by reason of any incapacity in the corporation to make the report because of the resignation of the majority of the trustees, or the effect of their subsequent abortive attempt to cause such report to be made, were properly presented on the trial, and if deemed material must be made the subjects of consideration on a future occasion.

The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event.

JOSEPH F. DALY, and LARREMORE, JJ., concurred.

Judgment reversed and a new trial ordered.

Cushman v. The Thayer Manufacturing Jewelry Co.

**ANNA M. CUSHMAN, Respondent, *against* THE THAYER
MANUFACTURING JEWELRY COMPANY, Appellant.**

(Decided January 7th, 1878.)

An action may be maintained by the owner of stock in a corporation against that corporation to compel it to transfer the stock upon its books.

Such an action is an equitable one, and the defendant is not entitled to a trial by jury.

APPEAL by the defendant from a judgment for plaintiff, entered upon a decision made by Judge JOSEPH F. DALY, at special term.

This action was brought by Anna M. Cushman against the defendants, a New York corporation, to obtain the transfer to plaintiff, upon the books of the defendant, of nineteen thousand five hundred shares of stock by defendant upon their books, and the issue to her of a certificate of such stock.

The original certificate of stock was issued to Peter B. Cushman (the plaintiff's husband), who was one of the incorporators of the defendant. Peter B. Cushman, on or about the 26th day of January, 1875, transferred the same to plaintiff. It was admitted by the pleadings that plaintiff, before this action was commenced, presented the original certificate of stock, with the assignment thereon to herself, to the defendant's proper officers, and offered to surrender the said certificate and demanded the right to transfer the same, and that defendant issue a certificate to her, and that the defendant refused to allow the transfer and refused to issue the new certificate.

The answer of the defendant alleged that said Peter B. Cushman, on or about April 19, 1875, sold and transferred said stock to Leonard S. Beals, and caused the same to be transferred to said Beals on the company's books, and that said Beals was the owner.

At the opening of the trial defendant demanded a trial by jury, which was refused, and an exception was taken. An

Cushman v. The Thayer Manufacturing Jewelry Co.

exception was also taken to a refusal of the court to dismiss the complaint. The motion to dismiss was upon the following grounds: That no cause of action was stated in the complaint or proven; that the case was one for trial by jury; that if any cause of action was stated, it was not one for equitable relief; that there was nothing in the case to show that full and complete compensation could not be awarded to plaintiff by a judgment for damages; that there was no proof of any damage whatever.

Robert Sewell, for appellant.

Richard C. Elliott, for respondent.

CHARLES P. DALY, Chief Justice.—Various exceptions were taken by the defendant upon the trial, most of which it would be unnecessary to consider, as the defendant has not relied upon them in his points, or discussed them upon the argument of the appeal. It will be necessary, therefore, only to pass upon the questions raised by the defendant's points and argued on the hearing of the appeal.

The action was an equitable one, to compel the transfer of the stock upon the books of the company, and was not one in which the plaintiff was entitled to a trial by jury, the relief asked for being purely one of equitable cognizance.

The main point discussed by the appellant is, that an action of this nature will not lie; the plaintiff having a remedy in an action for damages.

That an equitable action may be brought to compel a transfer of stock has been recognized in several cases—In *Middlebrook v. The Merchants' Bank of N. Y.* (41 Barb. 481; 18 Abb. Pr. 109; 27 How. Pr. 474), an action was brought to compel the bank to transfer certain stock to the plaintiff, and the judgment rendered was one directing the bank to make the transfer, which was affirmed by the Court of Appeals. (3 Abb. Ct. of Ap. Dec. 295.) It was held by the Court of Appeals that the plaintiff's demand had been wrongfully refused by the bank; and no question was made

either in the court below or in the appellate court, as to the right to maintain such an action. That there is such a remedy appears to have been recognized in *Bank of Attica v. Manufacturers', &c., Bk.* (20 N. Y. 501); in *Pollock v. The National Bank of N. Y.* (7 N. Y. 274); and in the *Com. Bank of Buffalo v. Kortwright* (22 Wend. 360), in which case Chancellor Walworth, certainly a very good authority in respect to matters of equitable cognizance, said that the plaintiff might file a bill to compel the bank to allow the transfer of the stock to the purchaser; and see *Chester Glass Company v. Davey* (16 Mass. 94); and *Angel & Ames on Corporations*, § 565, 8th ed.

A mandamus to transfer such a transfer was refused in *Rex v. Bank of England* (Doug. 523); *Shipley v. Mechanics' Bank* (10 Johns. 484); and *Exparte Fireman's Ins. Co.* (6 Hill, 243). But a mandamus is a common law proceeding, and the ground assigned by Lord Mansfield for the decision was, that when there is no specific remedy the court will grant a mandamus that justice may be done; and as an action would lie for complete satisfaction equivalent to specific relief, and the right of the party applying was not clear, the court could not interpose the extraordinary remedy by mandamus.

It does not follow from this that there is no remedy in equity to compel such a transfer. An action at law will lie to recover damages for the breach of a contract to convey land, but a court of equity will, notwithstanding, compel a specific performance, and require the vendor to execute a deed. An action to compel a corporation to transfer stock is analogous in its character. A party may not desire to sell his stock. It may be a valuable investment with a prospect of its gradual increase in value, and there is no reason why the owner of the stock should be compelled, because the corporation will not transfer it, to resort to an action for damages in which he can recover only the value which the stock may have when he obtains his verdict; for it does not follow, as in the ordinary case of merchandise, that the party, upon receiving the pecuniary value of the stock, can revossess himself of the same amount again, as there

Cushman v. The Thayer Manufacturing Jewelry Co.

may be none of it for sale; it being a circumstance of very common occurrence that there are stocks so valuable and so much desired by the holders as paying investments, that they rarely come into the market for sale. The owner, therefore, may desire to keep the stock as a valuable and highly remunerative investment for the same general reason that the vendee may prefer to have the land he has purchased, instead of a pecuniary compensation, because the vendor will not convey it to him. With the sanction in favor of an equitable action of this description, afforded by the cases which I have cited, I think we should hold that such an action can be maintained, leaving the question to the court of last resort, as their decision would be final.

I do not see that there was any occasion for a demand on the part of Thayer. The judge found that there was a valid transfer of the stock to the plaintiff, and that she has ever since been the owner and holder of it.

Thayer was authorized by the assignment to make the necessary transfer to her in the books of the company, and for all that appears in the case, may make the transfer at the plaintiff's request; or, if he should not be willing to do so, that would not deprive the plaintiff of her right as the true owner to have it transferred to her on the books of the company.

It is no answer to her claim that her husband afterwards sold the same stock to Beal, and that the company allowed the transfer of the stock to Beal by the plaintiff's husband, as they did it improperly, by allowing the transfer to be made without the surrender of the certificate. At all events, so far as respects the rights of Beal or his claim, it was suggested by the court below that he should be made a party to the action; whereupon the plaintiff and the defendant agreed that the action could proceed without his being made a party, and requested that it might so proceed; and a formal entry was made in the minutes, that the defendant made no objection that Beal was not a party. They have, therefore, waived such protection or benefit as they might have obtained by compelling the

Donnelly v. The Mayor, Aldermen and Commonalty of the City of New York.

plaintiff to make Beal a party, so that it might be determined and be conclusive as against him, whether the plaintiff was the true owner of the stock and entitled as against any claims that he had to have the stock transferred to her.

The judgment, in my opinion, should be affirmed.

VAN HOESEN and LARREMORE, JJ., concurred.

Judgment affirmed.*

JOHN DONNELLY, Plaintiff, v. THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK, Defendant.

(Decided January 7th, 1878.)

Proof of services rendered from year to year as "recording clerk" of a surrogate, is not sufficient to make out a case of employment under the Act of 1823, chap. 134, concerning the appointment of assistants by a surrogate to record the papers left unrecorded by his predecessor, or to justify the audit of a claim for such services as a county charge.

It seems, that act contemplates services of a temporary and special nature, and although it is the duty of the surrogate, when the exigency arises, to employ such services, and they will then be a county charge, the person claiming pay from the county by reason of appointment under that act, must show that the necessity for his employment under the act existed.

THIS case came before the general term on exceptions taken by defendant on the trial before Judge LARREMORE and a jury at trial term, which exceptions were ordered to be heard at the general term in the first instance.

Plaintiff brought this action for services rendered as clerk in the surrogate's office (New York county) from September 1st, 1868, to January 1st, 1870, \$1,600.

By a resolution of the board of supervisors of the county of New York, passed July 23d, 1867, and approved by the

* The decision here was affirmed by the Court of Appeals, March 18th, 1879.

Donnelly v. The Mayor, Aldermen and Commonalty of the City of New York.

mayor, July 30, 1867, the surrogate was "authorized and directed to employ such aid, not to exceed nine persons, as may be necessary to place the records of his office in a safe and useful form." By a resolution of the board passed and approved on the same day (July 30, 1867) the sum of \$5,000 was "set apart from the appropriation for county contingencies, to be applied toward the payment of the persons employed in the surrogate's office for and under the resolution adopted July 30, 1867."

Plaintiff was employed by the surrogate (Tucker) and went to work September 1st, 1867, "as recording clerk." His appointment was not in writing. Nine recording clerks altogether were employed under the resolution. He performed services continuously from that date until January 1st, 1870. Prior to 1868, he was paid \$100 per month; after September 1st, 1868, he was not paid.

The appropriation of \$5,000 made by the supervisors was exhausted in the latter part of 1867 or the early part of 1868.

In 1868 the surrogate made up his estimate of the expenses of his office for the year 1869 in detail, and transmitted it to the comptroller. It included the name of the plaintiff for a salary of \$900, also the other of the nine recording clerks at \$900 each. The nine recording clerks, including plaintiff, were struck out of the estimates, and no appropriation was made for them. The same thing occurred with the estimate for 1870, transmitted by the surrogate to the comptroller in 1869. Notwithstanding he was not paid after September 1st, 1868, plaintiff kept on at work in the surrogate's office. He was not, after that date, put on any pay roll, but Mr. Aiken, chief clerk of the surrogate, made out a monthly due bill for him, which he swore to, and which was filed in the comptroller's office.

The board of supervisors passed four resolutions directing payment to the plaintiff. One July 5, 1869, for \$1,000, for services at \$100 per month, from September 1st, 1868, to July 1st, 1869; one September 17, 1869, for \$200; one November 24, 1869, for \$200, and one December 27, 1869, for \$200. These resolutions were adopted upon bills made out

Donnelly v. The Mayor, Aldermen and Commonalty of the City of New York.

for those amounts to the county of New York by plaintiff for services as "clerk in the surrogate's office," which bills were duly verified by him. Defendant relied upon the act of 1847, chap. 432, section 7, requiring the appointment of assistants to the surrogate to be in writing; upon the prohibition in the act of 1867, chap. 806, section 2, against the creation of new offices by the supervisors; upon the provision of the act of 1857, chap. 590, sec. 5, declaring that no expense shall be incurred by the county, whether authorized by the board of supervisors or not, unless an appropriation of money then in the treasury sufficient to cover such expense shall have been previously made; upon the alleged ground that no legal claim against the county existed in plaintiff's favor when the supervisors audited and allowed his four successive demands in 1869; and upon the limitations upon county officers as to incurring expense when no appropriation is made for it. (See L. 1868, chap. 854, sec. 4, and L. 1869, chap. 575, sec. 7.)

The learned judge at special term directed a verdict in plaintiff's favor, and ordered the exceptions to be heard in the first instance at general term.

David J. Dean and Wm. C. Whitney, for defendants.

Malcolm Campbell, for plaintiff.

JOSEPH F. DALY, J.—If the plaintiff were employed by the surrogate to record papers unrecorded by his predecessor under the powers conferred by the act of 1828 (L. 1828, c. 134), it is probable that the expense of his employment would be a county charge and might be incurred by the surrogate and audited by the supervisors, notwithstanding the restrictions in the acts of 1857 (L. 1857, c. 590, § 5), of 1868 (L. 1868, c. 854, § 4), and of 1869 (L. 1869, c. 875, § 7), as to the incurring of expense without a previous appropriation. (*People v. Supervisors*, 22 How. Pr. 71; *People v. Supervisors*, 32 N. Y. 473; *People v. Green*, 56 N. Y. 466.) But the expense authorized by the act of 1828,

above cited, is of a special and peculiar nature, and has no reference to the permanent appointment of salaried clerks holding from year to year. The latter class of employees would properly fall within the description of "assistants," whose appointment by the surrogate is provided for by the act of 1847 (L. 1847, c. 422, § 7); whose appointment must be in writing and filed in the office of the clerk of the city and county of New York. The surrogate can appoint no greater number than the board of supervisors may prescribe from time to time. As to such appointments by the surrogate, when authorized by the board of supervisors, the restrictions of the acts of 1857, 1868 and 1869, as to incurring expense without appropriation, would apply, even if the appointees were not *officers* and the limitation on the power of creating new offices in the act of 1867 (L. 1867, c. 806, § 2) did not invalidate the appointments.

The resolutions of the board of supervisors of July 30, 1867, authorizing the surrogate to "employ such aid, not to exceed nine persons, as may be necessary to place the records of his office in a safe and useful form," and appropriating \$5,000 to pay such employees, was not necessary to make valid an employment by the surrogate under the act of 1828 (*supra*), making it his duty to record papers unrecorded by his predecessor. He had the power to employ persons for such purpose because it was his duty to do so.

If the said resolutions were offered to show authority for plaintiff's appointment generally as an "assistant" to the surrogate, there is still needed a written appointment by the latter and the filing of such appointment in the county clerk's office under the statute of 1847. It cannot be assumed that plaintiff was employed by the surrogate under the resolutions of July 30, 1867, to perform work required by the exigencies contemplated by the act of 1828, because no proof whatever of the nature of his duties, except that he was one of nine "recording clerks," appears in the evidence. It must be clearly shown that the surrogate acted upon the necessity provided for by the statute to justify the audit of plaintiff's claim by the supervisors as a county charge. But if we were

Donnelly v. The Mayor, Aldermen and Commonalty of the City of New York.

to assume that his employment by the surrogate under the resolution was an employment to perform duties demanded by the exigencies of the occasion for the safety of the public records, we would not be safe in assuming that such necessity was not fully met by the ample provision of clerks and funds then made for the purpose. The mere fact that the plaintiff continued to work in the surrogate's office after the appropriation of \$5,000 was exhausted, and so continued for sixteen months, proves nothing and entitles him to no fixed salary. (*Dunphy v. The Mayor*, 8 Hun, 482.) He shows no employment by the surrogate to perform special service, or at any fixed rate after the appropriation was exhausted.

The auditing of plaintiff's claim for these sixteen months by the board of supervisors does not help him, because without a legal claim against the county, the supervisors had no jurisdiction.

From the evidence in the case before us the plaintiff's claim seems to be based on a permanent, continuous employment from year to year, without a valid appointment being shown.

The defendant's exceptions are sustained and a new trial ordered, costs to abide event. (Code, § 1000.)

VAN HOESSEN, J., concurred.

CHARLES P. DALY, Chief Justice.—If the plaintiff had discharged the duties of an assistant to the surrogate, under circumstances that warranted him in concluding that he had been appointed an assistant, it may be that the omission of the surrogate to put the appointment in writing and file it, as required by the statute, would not have prevented the plaintiff from recovering the stipulated compensation. But it is not necessary to examine or pass upon that question, for it was not claimed on the argument that the plaintiff had been appointed by the surrogate an assistant, under the 7th section of the act of 1847 (L. 1847, c. 432).

The right to recover was put upon the express ground that the plaintiff was employed by the surrogate, as he had

Donnelly v. The Mayor, Aldermen and Commonalty of the City of New York.

a right to do, under the act of 1828, to record the orders and decrees of the surrogate's predecessor, and that his compensation therefor necessarily became a county charge, and I agree with Judge DALY, that there is no evidence in the case showing that such was the nature of the services performed by the plaintiff, during the period for which he sought to recover. All that appears is, that he was employed by Surrogate Tucker on the 1st of September, 1867, as a recording clerk; that two years afterwards, in the estimate of the expenses of the year 1869, made by the chief clerk of the surrogate, there were included the salaries of nine recording clerks, of whom the plaintiff was one, under the resolutions of the board of supervisors, of July 23d, 1867, empowering the surrogate to employ not exceeding nine persons to place the records of his court in the safe and useful form, and for which an appropriation of \$5,000 was made by the board of supervisors, to be applied towards the payment of the persons so employed, and that this estimate of expenses or budget was modified by deducting the salaries of the nine recording clerks, on the ground that no authority existed for their employment in 1869. The plaintiff's claim was for services from July 5th, 1869, to July 1st, 1870, and there is nothing in the case to show that during this time he was employed and performed the kind of service for which provision was made in the act of 1828.

I agree, therefore, that a new trial must be granted.

Exceptions sustained and new trial ordered, costs to abide event.

Hauger v. Bernstein.

ALOIS HAUGER *et al.* Respondents, *against* SOLOMON.
BERNSTEIN, Appellant.

(Decided January 7th, 1878.)

The act of 1872 (L. 1872, p. 1495, § 11), giving the Marine Court of the city of New York jurisdiction of an action on the official bond of a marshal upon leave being first granted by a justice of that court, does not repeal the provisions of the act of 1862 (L. 1862, c. 484, p. 971, *et seq.*), giving a justice of the Court of Common Pleas power to allow the marshal's bond to be prosecuted in the name of the parties aggrieved. The remedies under the two acts are different and either may be resorted to.

In an action in the Marine Court on the official bond of a marshal, brought in the name of the party aggrieved, an allegation in the complaint, that on a certain day leave was granted by the Court of Common Pleas to so bring such action, is sufficient upon demurrer. It is presumed that the leave was granted in a proper case.

Where the condition of the official bond of a marshal was, that he should "well and faithfully execute the duties of said office of marshal without fraud, oppression or deceit,"—*Held*, that allegations that the marshal, under an attachment against another person, seized property of plaintiff; that plaintiff obtained judgment of recovery and for damages; and that an execution on the judgment issued against the marshal was returned unsatisfied, constituted a sufficient assignment of a breach of the bond.

Quære, whether executions upon judgments in actions under the act of 1872, should issue out of the Marine Court or out of the Court of Common Pleas.

APPEAL by the defendant from a judgment in favor of plaintiff, entered upon an order of the general term of the Marine Court of the city of New York, overruling a demurrer to the complaint, and reversing a judgment entered upon an order of the special term of that court, sustaining the demurrer.

The action was brought by Hauger and another against Bernstein, one of the sureties of one Feeny, a marshal of the city of New York, upon his official bond to the mayor, etc., of the city, alleging as a breach, the seizure by said marshal of plaintiff's property under an attachment against one Gutierrez; the obtaining of judgment for damages against said

Hanger v. Bernstein.

marshal for the illegal seizure, the issuing of execution, return of no property, and leave granted by the Court of Common Pleas to prosecute said bond in the Marine Court in plaintiff's name.

To this complaint defendant demurred, specifying, among others, as grounds for demurrer, that plaintiff had not legal capacity to sue, a defect of parties. plaintiff, and that the complaint did not state facts sufficient to form a cause of action.

A. & L. Levy, for appellant.

J. R. Tressider, for respondents.

CHARLES P. DALY, Chief Justice.—The judgment of the general term of the Marine Court should be affirmed.

The act of 1872 (L. 1872, c. 629, § 11, p. 1495), giving the Marine Court jurisdiction of "an action on the official bond of a marshal, upon leave being first granted by a justice of the said court, at the chambers thereof," does not repeal the previous provision in the act of 1862 (L. 1862, c. 484, §§ 7, 8, pp. 971, 972, 974), giving a judge of this court power to order that the official bond of a marshal may be prosecuted in the name of any party aggrieved, in the Marine Court. The two proceedings are not the same. The action upon the official bond of a marshal in the Marine Court, under the act of 1872, must be brought in the name of the mayor. (*The Mayor, &c., of N. Y. v. Doody*, 4 Abb. Pr. 127.) The act of 1813 (R. L. 1813, c. 86, § 147, vol. 2, p. 397), requires a marshal's bond to be given to the mayor, aldermen and commonalty of the city of New York, and this statute contemplates a recovery, when had upon the bond, to be in the name of the mayor, etc., for the full amount of the penalty. (*Davis v. Haffner*, 2 Abb. Pr. 189, 190.) Under that act the action was always brought in the name of the mayor, upon an order made by a judge or the judges of this court, upon motion; and if there was a recovery upon the bond, this court was empowered, upon a motion made, to direct so much money

Hauger v. Bernstein.

to be levied thereon, as should be sufficient to pay the party the debt or damages recovered by him against the marshal, an action upon the bond being allowed only after a recovery against the marshal by a person aggrieved.

The act of 1872, giving the Marine Court jurisdiction of action upon such bonds, makes no provision as to the name in which the action shall be brought. As the bond is entered into to the mayor, the action must necessarily be in his name, for the provision in the Code (§ 113) requiring suits to be brought in the name of the real party in interest, is inapplicable to suits by official persons in their name of office (*Hoogland v. Hudson*, 8 How. Pr. 345).

The act of 1862 gives this court power to order an action upon a marshal's official bond, to be brought in the name of the party aggrieved, in the Marine and in the District Courts, and provides (§§ 6, 7, 8) under what circumstances it shall be allowed;—how the application is to be made, upon what notice, to whom the notice is to be given, and what must be shown to the satisfaction of the court before leave can be granted, which was what was done in this case; the action having been brought in the name of the party aggrieved in the Marine Court, upon an order made in this court, in the mode provided for in the act of 1862. These provisions of the act of 1862 are in no way affected by the provision referred to in the act of 1872. The power and jurisdiction given to this court in the former act, is not taken away, was not meant to be, and could not be, under the amended constitution, which declares that this court is continued with the powers and jurisdiction it had, when the sixth section of the constitution, as amended, took effect December 6th, 1869. This court had, by the act of 1862, power to order an action to be brought in the name of the aggrieved party, in the Marine Court. It possessed this power when the amended constitution was adopted in 1869, and it could not be taken away by the statute of 1872. The act of 1872 does not in fact mean to take it away. It simply gives a cumulative remedy, by allowing an action to be brought in the Marine Court upon leave granted by a judge of the court, and does

Hauger v. Bernstein.

not, in terms or by necessary implication, take away the previous remedy, so that either may therefore be resorted to (*Clark v. Brown*, 18 Wend. 220; 2 Coke's Inst. 200).

It is unnecessary to dwell upon the appellant's second point, as to the effect of the omission of the words of the Code, in the act of 1872, "and shall be deemed a judgment of this court;" for it is unnecessary to inquire whether, under the act of 1872, the execution, where transcripts are filed, should be issued in this court or in the Marine Court, though I suppose from the reading of the 8th section of that act that the intent of the provision, if constitutional, was that the execution should, in such cases, issue in the Marine Court, a change which in no way affects the act of 1862, which provides that a transcript of a judgment rendered against a marshal shall be filed in the office of the clerk of this court, and from the filing of the transcript, shall be deemed a judgment of this court, which is a specific provision, and in my judgment is not repealed either directly or by implication by the enactments in § 38, d. 11, and § 8 of the act of 1872, as both acts can be construed together, without any conflict; that is, that except in the case of a judgment against a marshal or his sureties in the Marine Court, the execution, after the filing of a transcript, is to issue in the Marine Court, for the simple reason that the jurisdiction, in respect to executions in actions in the Marine Court upon the official bonds of marshals, conferred upon this court by the act of 1862, could not be taken away under the constitution, even if it were meant to be. Whether the section of the act of 1872, so far as it abridges the previous enactment in the Code that upon the filing of the transcript of a judgment of the Marine Court, for \$25 or upwards, the judgment should be deemed a judgment of this court, as respects its enforcement by execution, is or is not constitutional, is a question we are not now called to pass upon.

It was sufficient to aver in the complaint, as the plaintiffs did, that on the 28th of June, 1875, leave was granted to them by this court to prosecute the bond in the Marine Court in their own name. It is not necessary to set forth

Hauger v. Bernstein.

specifically the proceedings upon which leave was granted, to show that the act of 1862 had been complied with. It will be presumed, the court having jurisdiction to make such order, that it did so in a proper case.

A breach was sufficiently assigned. It is that the marshal, under an attachment against one Gutierrez, seized certain property belonging to the plaintiff. That the plaintiff brought an action against him in the Marine Court, to recover the possession of the property, and damages for his seizing and detaining it, and that judgment was rendered against the marshal for \$126—damages and costs; that he appealed from the judgment, which was affirmed; that judgment for \$27 50, costs of appeal, was entered against him, and that executions against him, upon the judgments, were issued and returned unsatisfied.

This was a sufficient assignment of the breach, as appears by reference to the bond annexed to the complaint, to entitle the plaintiff to recover, and the judgment of the Marine Court should be affirmed.

JOSEPH F. DALY, J., concurred.

Judgment affirmed.

Prime v. Koehler.

DAVID W. PRIME *et al.* Respondents, *against* HERMANN KOEHLER, Appellant.

(Decided January 7th, 1878.)

Where the owner of land subject to an over due mortgage made by a former owner made an oral agreement with the holder of the bond and mortgage to the effect that if he would extend the time of payment, and forbear to foreclose, he would pay him the amount of certain interest on the bond, partly then due, and partly to become due within the extended time,—*Held*, that the agreement was not void under the Statute of Frauds, as a promise not in writing to answer for the debt or default of another, but was an original and valid agreement on a new and sufficient consideration.

The case of *Doolittle v. Naylor* (2 Bosw. 206), to the contrary, disapproved.

APPEAL by the defendant from a judgment in favor of plaintiffs entered on a decision made by Judge ROBINSON at special term.

The action was brought by the plaintiffs, Prime and another to recover the amount of certain installments of interest on a bond secured by a mortgage on the land of defendant.

The bond and a mortgage accompanying it were executed by a former owner of the land covered by the mortgage. The defendant took the land from the former owner, subject to the mortgage, but did not assume payment of it. The interest being in arrears and the principal due, by reason of default in payment of interest, the plaintiffs, holders of the bond and mortgage, were about to foreclose. Defendant, in consideration of a waiver by plaintiffs of the right to demand payment of the principal and to foreclose the mortgage, and of their extension of the time of payment, orally agreed to pay the amount of certain interest due, and interest to become due within the time of such extension. The cause was submitted on an agreed state of facts presented to the court in the pleadings and a stipulation of counsel.

Prime v. Koehler.

The following opinion was delivered by the court at special term:—

ROBINSON, J.—The defendant in September, 1875, became owner of certain real estate, subject to a mortgage executed by, and given to secure a bond of, one Joseph M. Koehler, dated August 28th, 1871, conditioned to pay \$29,642 50 on the first day of September, 1875, together with interest semi-annually on the first days of March and September, 1875.

The bond in September, 1875, was reduced to \$22,000, and the time of payment extended to September 1st, 1877, “subject to the usual interest default clause.”

In September, 1875, said premises were conveyed by said Joseph M. Koehler to the defendant, subject to the mortgage, but without any assumption by defendant of any personal responsibility for the payment of the debts, and he still owns the premises.

On or about March 1st, 1876, \$770 became due and payable for the past six months’ interest, &c., which remained unpaid for thirty days; according to the condition of the bond, the whole principal thereby became payable at the option of the plaintiffs.

And the complaint further alleges, “that thereafter and while the said interest remained so in arrear, the said defendant promised and agreed to and with the said plaintiffs *that in case they would* not exact the payment of said principal or foreclose said mortgage, and would give time for the payment of said interest, he, the said defendant, would pay, when the next instalment of interest should accrue, the interest then in arrear, together with that which should then accrue, making the interest for the whole year, and that the plaintiffs thereupon waived the right to demand payment of said principal sum, and to foreclose said mortgage, and allowed the same to remain to and until the first day of September, 1876. And that in the said month of September, 1876, said defendant requested further time, and that thereupon said plaintiffs extended such time of payment to and until the month of December, 1876, upon the promise of said defendant

that he would pay one-half the interest then due, on or before the fifteenth day of November, and the other half on or before the first day of December, 1876, but the defendant has hitherto failed to pay such interest, or any part thereof," and judgment is demanded for two instalments of \$770 each.

It is conceded that none of the alleged promises of the defendant were in writing, and the cause, with this admission, has been submitted on the pleadings.

The first objection is as to the validity of the alleged agreement for want of consideration, founded upon any promise or agreement of the plaintiffs "to do or forbear anything," and no concurrent obligation of mutual promises upon which the minds of both parties met.

The complaint alleges that defendant's oral promise was founded on the consideration that in case plaintiffs would not exact the payment of the principal or foreclose said mortgage, and would give time of payment of said interest, he, the said defendant, would pay, when the next instalment of interest should accrue, the interest then in arrear, together with that which should then accrue, "and that plaintiffs then waived the right to demand payment of said principal sum and to foreclose said mortgage, and allowed the same to remain to and until the first day of September, 1876."

This statement of a consideration for defendant's promise made after the March interest accrued, fails to establish any agreement. The plaintiffs do not allege they then also *agreed* to give time of payment of the interest for the ensuing six months, but merely that they "waived payment of the principal and to foreclose said mortgage, and allowed the same to remain to and until the first of September, 1876." This is neither in accordance with defendant's proposition *in hæc verba*, nor in legal effect, and nothing in the statement of a cause of action on this promise of the defendant discloses any agreement to his proposition, or which debarred them from enforcing payment of interest by suit against the obligor in their bond. There was no concurrence of the minds of the parties, or mutuality of obligation, in the agreement as alleged.

The promise alleged to have been made in September,

Prime v. Koehler.

1876, is however of a different character, to wit: that on request of the defendant, the plaintiff *extended* the time of payment of both instalments of interest until the month of December, 1876, upon his promise to pay one-half the interest then due on or before the 15th day of November, and the other half on or before the first day of December.

The fact that plaintiffs so extended such time of payment of the interest in arrear is not controverted, and the promise founded upon such executed consideration, if otherwise in due form of law, would be binding. An actual extension of a debt is a good consideration upon which a valid agreement may be predicated, but if the obligation thus assumed by the defendant was simply in respect to a debt due by the obligor in the bond, it, not being in writing, was void under the Statute of Frauds (2 R. S. 135, § 2, subd. 2). As Judge Nelson says in *Watson v. Randall* (20 Wend. 204): "The cases are uniform on the point that the promise to pay (a subsisting debt of another) in consideration of forbearance is within the statute." In *Mallory v. Gillett* (21 N. Y. 416), Judge Comstock, while thus speaking of forbearance or waiver of collateral advantage, says: "These considerations are all of them sufficient to sustain the auxiliary undertaking. But if they also dispense with a writing, then so far as I see there are no cases to which this branch of the Statute of Frauds can apply."

Except for the considerations hereafter stated, the obligations of Joseph M. Koehler upon his bond to pay principal and interest still subsisted, and plaintiffs' lien upon the land for the payment of their debt remained unimpaired, and defendant's promise was entirely collateral and within the Statute of Frauds.

The defendant was not personally bound for the payment of the bond and mortgage upon purchase of the premises subject thereto (*Belmont v. Coman*, 23 N. Y. 438), but the mortgaged premises being the primary fund for the payment of the mortgaged debt, his grantor (the mortgagor), Joseph M. Koehler, stood in the relation of a surety. A release of the mortgage security would (at least) *pro tanto* have re-

leased him from his obligation upon the bond, whether that was effected by an absolute release or by an extension of the time of payment of principal or interest. Such an extension as is alleged and conceded, relinquished the right of sequestration of the rents and profits accruing during that period, as well as the right to sue for the debt thus extended. It afforded the defendant the means of continuing to collect the rents and profits to his own use, and thereby impaired the plaintiffs' rights as incumbrancer against the property owned by him.

In obtaining such extension, the defendant was not dealing as surety or guarantor, or in friendly intervention to protect another, against the harsh or coercive measures of a creditor, but was acting directly for the protection of his own interests, and in obtaining benefit or indulgence in respect thereto which enured directly to his own personal advantage. It was in every respect his own bargain founded on good consideration, and not one simply to answer for the debt or default of another, but moving exclusively to himself so as to enable him to enjoy some time longer the free, unquestioned possession of the mortgaged premises. Such an agreement was not, in my opinion, obnoxious to the provision of the Statute of Frauds, but was obligatory on the defendant as an original undertaking, founded on a good consideration.

Judgment for plaintiff for amount claimed.

Lewis Sanders, for appellant.

F. A. Paddock, for respondents.

CHARLES P. DALY, Chief Justice.—The judgment should be affirmed. It was not the case of an agreement to answer for the debt, default, or miscarriage of another. The defendant was the owner of the premises which he held subject to the mortgage. He was not liable to pay the interest on the mortgage, not having assumed the payment of the mortgage when the premises were conveyed to him. But default had been made in the payment of the interest by the mortgagor, where-

Prime v. Koehler.

by, according to the condition, the whole amount of the mortgage became payable at the option of the plaintiffs. The agreement of the defendant was, that if the plaintiff would not exact the payment of the principal or foreclose the mortgage, he would pay the interest that was then due, when the next instalment should become due; together with the interest that should then accrue, making in all, the interest for one year. This was a promise founded upon a new consideration of benefit to the promisor, moving between the new contracting parties—the plaintiffs and the defendant—and comes exactly within the distinction laid down by Chief Justice Kent, in *Leonard v. Vredenberg* (8 Johns. 29), and which has ever since been recognized as a case that is not within the statute. (*Mallory v. Gillett*, 21 N. Y. 417, 418, 429, 433; *Brown v. Weber*, 38 N. Y. 190; *Brewster v. Silence*, 8 N. Y. [4 Seld.] 212.) The distinction is well put by Tindal, Ch. J., in *Walker v. Taylor* (6 Car. & P. 752), that it is not within the statute where the promise is; “in consideration of that which is *an advantage to me*, I will pay you this money.” It is in such a case, as Chief Justice Tindal said, “a new contract under a new state of circumstances,” and such was the case here. Default having been made by the mortgagor in the payment of the interest, and the principal having thereby become payable, the plaintiff had the right to foreclose the mortgage and sell the premises, which he gave up for a year, upon the defendant’s promise that he would, at the end of that time, pay the interest for the whole of the year. The mortgagor had no longer any interest in the premises, having conveyed them to the defendant, except that they might be applied to the payment of the mortgage, to release him, if they were sufficient for the purpose, from any further liability for the principal and the interest upon his bond; so that the agreement made with the plaintiff, to delay for a year the enforcement of the debt and the payment of the interest, was an agreement solely for the defendant’s benefit and advantage, as it left him for a year longer in the possession of the premises and the enjoyment of the rents and profits, as Judge Robinson remarked, which other-

wise might have been applied, if the mortgage's security was insufficient, towards the payment of the plaintiff's debt.

Judge Comstock, in *Mallory v. Gillett* (*supra*), has drawn attention to the distinction in the cases, between a consideration which arises from something which the creditor has given up upon the faith of the promise, and a consideration which arises from an advantage or benefit which the promisor derives from the agreement; in the former of which cases, the agreement is within the statute, and in the latter, it is not. The present case includes both, for there was the consideration of disadvantage to the creditor if the promisor should not perform his agreement, and of advantage to the promisor if the creditor fulfilled his part of it.

The case of *Doolittle v. Naylor* (2 Bosw. 206) is a case which undoubtedly sustains the defendant's view upon this appeal; for in that case, the consideration consisted, not only of the damage to the creditor from forbearing to foreclose the mortgage, but of benefit resulting to the defendant from the use of the mortgaged property in the mean time, in which the court said and held that it was a promise to pay the debt of a third person, and not being in writing, it was void under the statute.

The authorities to which I have referred, which hold that where the promisor obtains an advantage or benefit by the agreement it is not within the statute, were not considered in that case, as they are not referred to in the opinion delivered. The distinction between disadvantage to the creditor and advantage to the promisor does not appear to have been presented; for *Mallory v. Gillett* (*supra*), in the Court of Appeals, was not decided until three years afterwards, and the court had not the benefit of Judge Comstock's lucid exposition of this material distinction, and were probably not referred to the cases which hold that the agreement is a new one, when some benefit or advantage is derived from it by the promisor.

Judge Bosworth, in holding in this case of *Doolittle v. Naylor* (*supra*) that the agreement was void by the statute, although the consideration was not only of damage to the

plaintiff, from forbearing to foreclose his mortgage, but of benefit to the defendant from the use by him of the mortgaged property in the mean time, cites in support of that broad and untenable proposition five previous cases in this State (*Larson v. Wyman*, 14 Wend. 246; *Smith v. Ives*, 15 id. 182; *Watson v. Randall*, 20 id. 201; *Hall v. Farmer*, 5 Denio, 484; *Brewster v. Silence*, 8 N. Y. 207), none of which go that length, or hold that the agreement is within the statute, even though the promisor may derive a benefit or advantage from it; but on the contrary, the last of the cases cited—*Brewster v. Silence* (*supra*)—recognizes as correct the distinction taken by Chancellor Kent, in *Leonard v. Vredenberg* (8 Johns. 828), and approved as discriminated by Judge Comstock, in *Mallory v. Gillett* (*supra*), that when the promise to pay the debt of another is founded upon some new and original consideration or benefit to the promisor, it is not within the statute. The other cases relied upon by the defendant do not sustain him.

In *Duffy v. Wunsch* (42 N. Y. 244), the only consideration for the promise was, that the creditor discontinued a suit against a third party, which, since *Read v. Nash* (1 Wils. 305), has uniformly been held not to take the case out of the statute. In *Brown v. Weber* (38 N. Y. 190), the distinction that some advantage or benefit must be received by the promisor from the agreement is distinctly recognized as a test, which shows that the case is not within the statute. The language of Judge Grover is this: "Another test relied upon in many cases, is whether the consideration was new—not arising out of the existing obligation, and received by the party making the promise;—where this was the case, it was held that the case was not within the statute." He observes that a test is, whether the party promising contracted an independent obligation of his own, or whether his position towards the creditor was that of a surety; remarking that the receipt or non-receipt of a consideration by the party promising, does not determine in every case whether it is within the statute or not; but the inquiry remains whether he entered into independent obligations of his own,

Prime v. Koehler.

or whether his responsibility was contingent upon the act of another. And applying that distinction to the case then before the court, he held that the agreement was within the statute, because, although the mill was built upon the land of the defendant, and became his property, and it was for his benefit that it should be completed, still it was plain, from the nature of the defendant's promise, that his liability was contingent. One Horton had contracted with the plaintiff for the erection of the mill, and was to pay the plaintiff for building it; but after the plaintiff began to build it, he became doubtful as to Horton's responsibility, which he communicated to the defendant, and the defendant being anxious to have the mill finished, promised the plaintiff that if he would go on and finish it according to the contract, he would see that he did not lose any thing by it; that he would see that the plaintiff got his pay, if he finished the mill according to the contract. Here, it was clear that the defendant, by the agreement, was to be liable only in the event of Horton's failing to pay, when the mill was completed, which was clearly a contingent obligation, though the defendant may have derived a benefit. It was an undertaking to pay if Horton did not, and was therefore plainly within the statute an agreement to answer for the default of another.

There was no such feature in the present case. The mortgagor was undoubtedly liable, upon his bond, to pay the plaintiff the principal and the interest; but the defendant's obligation for the consideration received was not made dependent upon that; it was an express undertaking that if the plaintiff abstained from enforcing his mortgage for a year from that date, that he, at the expiration of that time, would pay the interest. It was a new contract, made solely for his benefit, and in no way contingent or dependent upon the acts of the mortgagor, who was already in default. It was an original and independent obligation by which the defendant bound himself, for a consideration received from the plaintiff, to pay to the plaintiff, at a certain time, the interest that might then be due upon the mortgage, and comes dis-

Dethlefs v. Tamsen.

tinctly, in my judgment, under the class of cases which hold that such an agreement is not within the statute.

The judgment should therefore be affirmed.

VAN HOESSEN, J., concurred.

Judgment affirmed.

JOHN D. DETHLEFS, Appellant, *against* EDWARD J. H.
TAMSEN, Respondent.

(Decided January 7th, 1878.)

Where a retiring partner, on being paid for the good will of the business, agrees with the remaining partner not to engage in business in opposition to him so near as to take away his customers and injure his trade, the agreement only provides for a fair protection to the continuing partner, and is not void as against public policy.

Where such is the intent and meaning of an agreement of dissolution and sale of good-will, evidence showing that a new store of the retiring partner, opened by him in the same trade within two doors of the old stand, resembled the latter in outward appearance, is material in determining whether there has been a breach of that agreement, and the amount of damage occasioned thereby.

And in such an action the continuing partner, a party to the action, may testify in what amounts his monthly receipts fell off after the opening of the opposition store.

Evidence of falling off in the receipts of the injured party, without specific proof of individual instances of loss of custom, is sufficient to warrant a jury in awarding damages.

APPEAL by the defendant from a judgment in favor of plaintiff, entered upon a verdict rendered at the trial before Chief Justice CHARLES P. DALY, and a jury.

This action was brought by Dethlefs against his former partner, Tamsen, upon a promissory note for \$3,000 made by Tamsen to Dethlefs.

The answer admitted the making and delivery of the note, and set up as a defense, failure of consideration to

Dethlefs v. Tamsen.

the extent of \$2,500 of the note, to which extent the note was given in payment to the plaintiff for the good-will of the partnership upon a previous sale by plaintiff to defendant of plaintiff's interest, which sale was made upon the agreement of the plaintiff "not to injure said sale by any actions whatsoever." The answer alleged further, that after the dissolution the plaintiff opened a store near by the place of business of the late firm and of defendant, of the same character, and in various ways attracted away from defendant's store the former customers of the firm, by leading them to believe that the new store was that of the former partnership. The answer also counter claimed damages in the amount of \$3,000 for setting up such business in violation of the terms of the articles of partnership as to dissolution.

The jury gave a verdict for plaintiff for \$520. Plaintiff appealed. The cause was argued upon a case and exceptions, which latter, with the rulings excepted to, sufficiently appear in the opinion of the court.

L. C. Waehner, for appellant.

Henry Wehle, & Simon Sultan, for respondent.

VAN HOESSEN, J.—The plaintiff simply appeals from the judgment, not having made a motion for a new trial in the court below; and we are called upon to examine the exceptions he took upon the trial.

It is well settled that a retiring partner, by selling the good-will of the business to his associate, does not deprive himself of the right to engage in or prosecute a similar business in the vicinity of the place of business of the dissolved firm. (*White v. Jones*, 1 Abb. Pr. N. S. 328.) If the retiring partner, after selling the good-will, represents the new business which he establishes to be the same that the dissolved firm carried on, or if he leads customers to believe that he is carrying on business as the successor to the old firm, or if he induced his former partners to buy his interest in the good-will by falsely stating to them that he did not intend to engage in a similar business in competition with,

Dethlefs v. Tamsen.

or in opposition to, them, he may, perhaps, be restrained by injunction from continuing to perpetrate the fraud. (*White v. Jones, supra.*)

The answer of the defendant contains allegations which, if supported by proof, would probably entitle him to an injunction. Equitable relief the defendant did not seek. He sought in a court of law to defeat the action on the note given for the good-will; and the question presented is, whether the exceptions taken at the trial are such that we must set aside the verdict of the jury, a verdict which seems to me to measure out substantial justice to both parties.

The original partnership articles between Dethlefs and Tamsen provide, that if either of the partners should retire from the firm, the partner keeping and carrying on the business should pay to the other for the good-will a sum equal to one-third of the net profits of the first year, and that the retiring partner should contract not to conduct any business in opposition to, or in competition with, that continued by the partner purchasing the good-will. When Dethlefs and Tamsen came to dissolve, which they did after having been partners for nearly four years, they departed from the method of valuing the good-will provided for by their partnership articles, and agreed that the price to be paid to the retiring partner for his interest in the good-will should be twenty-five hundred dollars. That sum Tamsen undertook to pay Dethlefs for his (Dethlefs') interest in the good-will, and it forms part of the three thousand dollars for which Tamsen executed to Dethlefs the note which is in suit. The evidence in the case is not before us, so that we have no means of ascertaining whether Tamsen substantiated upon the trial the allegations of his answer; and we shall not, therefore, venture an opinion as to the aspect this case would wear if Tamsen had proved that Dethlefs had deliberately defrauded him, and deceived the customers of the old firm. It appears, however, that Dethlefs, when he conveyed his interest in the business, covenanted with Tamsen that he would "not injure the sale" he had made "by any actions whatsoever." Although the language of this covenant is not at all artificial, and

Dethlefs v. Tamsen.

though it was evidently framed by some person very imperfectly acquainted with English, I think it was intended to carry out that clause of the partnership articles which required the retiring partner, on being paid for the good-will, to agree not to engage in any business in opposition to that carried on by the continuing partner. If such be the true intent and meaning of that covenant, we have before us a case where the retiring partner not only sells the good will, but furthermore agrees not to start or carry on a competing business near enough to the continuing partner to injure his trade. It is true that no limits are specified within which Dethlefs is prohibited from starting business; but nevertheless it is obvious that the covenant means that he should not keep a store in such proximity to the old stand that persons living in the neighborhood would be quite as likely to go to the new shop as to the old. If it meant that Dethlefs should not keep store anywhere, it would, of course, be contrary to public policy, and be illegal. We have no doubt that the learned judge at the trial properly construed the covenant, for it would be most unreasonable to say that an agreement not to injure an established trade by rivalry necessarily operated as a restraint upon the establishment of a similar business in any locality where it would not injure the purchaser of the good-will. Contracts in restraint of trade are held to be against public policy when they deprive the community of the opportunity of conveniently supplying some of its wants. Every locality is entitled to its appropriate accommodations, and if such accommodations be furnished, the law will uphold covenants against competition with those by whom they are supplied. (*Lawrence v. Kidder*, 10 Barb. 641.)

The true test is, whether the restraint is such as only to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public. No precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive. (*Horner v. Graves*, 7 Bing. 743.) Every case, as it arises, must be determined upon its own cir-

Dethlefs v. Tamsen.

cumstances ; and we repeat that we think the learned judge was right in holding it was not against public policy for Dethlefs to covenant not to injure by competition the good will he had sold.

We see no error in the admission of the evidence of Dr. Petzold as to the resemblance in outward appearance between the new store of Dethlefs and the old store of Tamsen. If the covenant of Dethlefs has the meaning I have ascribed to it, the evidence tended directly to show a breach of it.

Nor was there any error in permitting Tamsen to show the falling off in the receipts of his business subsequently to the opening by Dethlefs of his opposition store. That evidence bore directly on the question of damages. Nothing could better show the injury accomplished by the opening of the competing store than the diminution in Tamsen's receipts. This evidence was not rendered irrelevant or immaterial, because it was allowable to the plaintiff to argue that the decrease of the receipts was possibly attributable to the dulness of the times, or to some other cause than Dethlefs' competition. The jury were instructed that they could not find in favor of the defendant's defense unless they were satisfied that the opposition store was the sole cause of the decline in the defendant's business. That instruction was certainly as favorable to the plaintiff as he had a right to claim.

The only remaining exception that I think it necessary to notice, was taken in various forms ; but its real point is, that the court erred in refusing to hold that the defendant had offered no legal evidence as to the amounts of damage sustained by him. The counsel for the plaintiff contends that the defendant was bound to name in his answer the customers whose trade he had lost, and to prove his allegations as made. If such was the duty of the defendant, he has failed to make out his defense. But no such burden ever was, or ever should be, imposed upon a party asking general damages for the breach of a covenant. There is a well settled distinction between cases where general damages are recoverable and cases where special damage must be shown, in order to give a right of action at all, or to

Dethlefs v. Tamsen.

entitle a party to recover for special injuries which the law does not presume to follow the doing of the act complained of. In *Ashley v. Harrison* (1 Esp. 48), where the action was for libel on an actress, in consequence of which she would not sing, and the declaration alleged as damages the loss of several performances, Lord Kenyon ruled that the box-keeper might be asked generally whether the receipts had not diminished from the time Madame Mara had declined to sing; but that to ask if particular persons had not in consequence given up their boxes, was specific damage, and inadmissible. So in *Ingram v. Lawson* (6 Bing. N. C. 212), though no special damage was laid, the plaintiff was allowed to prove, in an action of libel (where the defamatory publication alleged that the plaintiff's ship was unseaworthy and had been hired to take out convicts), the average profits of a voyage to the East Indies, and that the first voyage after the libel, the profits were nearly £1,500 below the average. It was there said that the jury must have some mode of estimating the damages, and they could not be in a condition to do so unless they knew something of the plaintiff's business, and of the general return of his voyages. In *Rose v. Groves* (5 M. & G. 618), in an action for obstructing access to the plaintiff's house, whereby divers persons who would otherwise have come to the house and taken refreshment there were prevented, it was held to be unnecessary to name any one. Without averring any special damage, the defendant was entitled to recover, as general damages, such a sum as would put him in the same condition as if the covenant had not been broken; and the jury were authorized to take into consideration the results of the breaches, past and future. "A man may show a general damage to his trade, though he cannot give evidence of particular instances." (*Rose v. Groves* [*supra*]). See also *Hartley v. Herring* (8 T. R. 130), and *Ward v. Smith* (11 Price, 19.) In contracts like this in suit, it is customary to insert a provision liquidating the damages in case of a breach, and where such a provision is found, the courts usually allow a recovery for the stipulated amount of damages. Where the parties omit to liquidate the damages,

Hernandez v. Stilwell

there is no reason why courts should put a premium upon bad faith by requiring the injured party to name each particular person who has been induced to pass his store for the purpose of trading with the intruding competitor. A general allegation of loss of trade in consequence of the breach of the covenants, with proof of the diminution of receipts, is sufficient to warrant the jury in awarding damages. No question is presented here as to the amount of the recovery. It appears, however, that the jury deducted from the amount of the note the sum which the parties, at the time of the dissolution, agreed upon as the value of the good-will. They doubtless regarded the plaintiff in the light of a vendor who, after selling an article and receiving a note in payment, wilfully destroys the subject of sale before delivery.

I think there was no error at the trial, and that the judgment should be affirmed with costs.

JOSEPH F. DALY and LARREMORE, JJ., concurred.

Judgment affirmed with costs.

RAMON MARTINEZ HERNANDEZ, Respondent, *against* SILAS
M. STILWELL, Appellant.

(Decided January 7th, 1878.)

In an action upon a contract indorsed upon a money bond and expressed in these words : " I expressly guarantee the *ultimate* payment of the sum named herein, together with interest and all lawful charges, or so much thereof as shall be due and owing."—*Held*, that the contract intended a liability only upon default of the principal debtor, and that a complaint on the contract not setting forth a demand on the principal debtor, his default, and notice to the defendant, was bad on demurrer.

An obligation, where the word " guaranty " is used, may be construed as an original and absolute one, but not unless it is plain that such was the intention of the parties.

Hernandez v. Stilwell.

APPEAL by the defendant from an order made at special term, by Judge VAN HOESEN, overruling a demurrer to the complaint.

The action was brought by Hernandez, upon a contract of Stilwell, indorsed upon the bond of one Remington.

The complaint set forth the contract, which was in the following words:

"For and in consideration of one dollar, to me in hand paid by Ramon Martinez Hernandez, the receipt of which is hereby acknowledged, and other good and valuable considerations me thereto moving, I hereby expressly guarantee unto the said Ramon Martinez Hernandez the ultimate payment of the sum of money named herein, together with interest and all lawful charges, or so much thereof as shall be due and owing, for which I do hereby bind myself, my heirs, executors and administrators.

"Sealed with my seal, and dated the 18th day of December, 1868."

The complaint alleged the making and delivery of the bond of even date; that it was conditioned for the payment of money only; and that only a part of that sum had been paid; and that there was due and owing on the bond a specified sum. It appeared that the time within which the amount of the bond was by its terms payable had passed at the beginning of the action.

The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action.

H. C. Gardiner, for appellant.

Edmund Wetmore, for respondent.

CHARLES P. DALY, Chief Justice.—The defendant's obligation was a conditional undertaking. He guaranteed the *ultimate* payment of the sum of money named in the bond given by Remington to the plaintiff, together with interest and all lawful charges, or so much thereof as might be due

Hernandez v. Stilwell.

and owing. He did not engage as principal. His obligation imposed upon him no duty but the ultimate payment, if Remington failed to pay, of what might be due on the bond, with interest and all lawful charges. It was a guaranty. He says, "*I expressly guarantee*," which is to engage for the payment of a debt or the performance of a duty by another. (*Durham v. Manrow*, 2 N. Y. 549; *De Collyer on Guaranties*, p. 38.) A promise that if Remington did not pay the bond, that he would, guaranteeing "*the ultimate payment*," implies a default, or something which is to precede, before he who guarantees is ultimately bound, or the word ultimate in the connection in which it is used has no meaning; and we are bound to give their ordinary meaning and full effect to the words used by the guarantor. (*Bissell v. Ames*, 17 Conn. 127; *White v. Reed*, 15 id. 457; *Crist v. Burlingame*, 2 Barb. 351; *Leggett v. Humphreys*, U. S. N. S. 66; *Shore v. Wilson*, 5 Scott N. R. 1037; *Story on Promissory Notes*, § 472, pp. 599 to 603; § 474, p. 614; 2 *Parsons on Contracts*, 505; *Broom's Legal Maxims*, 456, 6th Amer. ed.) Where the words are ambiguous, they are to be construed most strongly against the guarantor (*Mayer v. Isaac*, 6 Mees. & W. 605), for it is his fault if they are so. But there is no ambiguity in the words "*the ultimate payment*," the word ultimate having a definite meaning, which is that another is to be resorted to, and if he makes default or cannot pay, the debt is secured by the ultimate liability of the defendant. This appears to me to be the plain meaning of the language, and implies some endeavor or diligence on the part of the creditor to secure the debt from the principal debtor,—at least, a demand of the debt from him,—his failure to pay and notice to the guarantor, that he may at once take such measures as may be within his power to secure or indemnify himself. (2 *Parsons on Contracts*, pp. 25, 27 and 28, 6th ed.; *Foote v. Brown*, 2 McLean, 369; *Oxford Bank v. Haynes*, 8 Pick. 423; *Story on Promissory Notes*, § 460, 472.) I do not say that it requires that the creditor shall exhaust the ordinary legal remedies against the principal debtor to enforce the payment of the debt, as in the cases of a guaranty

Hernandez v. Stilwell.

of the collection of a debt (*Craig v. Parkis*, 40 N. Y. 181);—but the instrument contemplates the probability of such a procedure on the part of the creditor; as it provides not only for the ultimate payment of the sum named in the bond, with interest, or so much of it as shall be due and owing, but also the payment of *all lawful charges*. All that is recoverable upon the bond is what may be due upon it, with interest; and this additional undertaking for the payment of all lawful charges would appear to contemplate such lawful charges as the creditor may be put to by his effort, in good faith, to compel the payment of the bond by the principal debtor. The fact of such an additional undertaking goes very far to show that the engagement was meant to be one of guaranty;—an engagement that if Remington failed to, or did not pay, the defendant would pay. That this was what was intended, further appears by what is put in the disjunctive, or “so much” of the sum of money named in the bond “as shall be due and owing,” implying that there might be a payment of part of the sum by the principal debtor, and that the defendant’s engagement is for the ultimate payment of the residue, with interest and all lawful charges.

The word guaranty may be used when the engagement is an original and absolute one to pay the debt, when it becomes due. But that construction is put upon it only when it is plain that that was the intent of the parties (*Brown v. Curtiss*, 2 N. Y. 225; *Durham v. Manrow*, id. 534); as where the engagement was in fact to pay the guarantor’s own debt by means of the note of a third person, the payment of which he guaranteed, and which it was held, in the cases last cited, was not, within the statute of frauds, a special promise to answer for the debt, default, or miscarriage of another; the rule in determining whether the instrument is an original undertaking or a guaranty being, that the language used is to be so interpreted as to ascertain and give effect to the real intention of the parties. (*Crist v. Burlingame*, 62 Barb. 351; *White v. Reed*, 15 Conn. 457.) Where a party, therefore, gives to his creditor, for the pay-

Hernandez v. Stilwell.

ment of his own debt, a promissory note of another and writes upon the back of the note: "I guarantee the payment of the within," it is not a conditional, but an absolute undertaking that he will pay the note to the creditor when it becomes due, being himself indebted to the creditor in the full amount of the note. That is what is necessarily meant in such a case by the word guaranty; for being primarily liable to the creditor for the full amount of the note, the intent cannot have been that he was to pay the amount only in the event of the failure or inability of the maker to pay it. But there is nothing of this kind averred in the complaint to give to the word guaranty a meaning other than, and different from, what the word ordinarily implies. If the bond were payable in instalments, then the word ultimate might be understood as meaning an ultimate and absolute engagement to pay the whole or whatever might remain due upon it. But it was not. It was entered into on the 18th of December, 1868, and was for the payment of the full sum of \$20,000, with interest, on the 18th of December, 1869; the interest being payable semi-annually, so that there is nothing upon the face of the bond itself to give to the word ultimate a special signification in connection with the instrument, or to qualify the ordinary meaning of the word guarantee.

"The law," said Chief Justice Marshall, in *Russell v. Clark* (7 Cranch, 90), "will subject a man having no interest in the transaction to pay the debt of another, only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction. It is the duty of the individual who contracts with one man, on the contract of another, not to trust to ambiguous phrases and strained constructions, but to *require* an explicit and plain declaration of the obligation he" (meaning the one entering into the obligation) "is about to assume." And Justice Story, in *Lawrence v. McCalmot*, in reference to such obligations, remarks that words are not to be forced out of their natural meaning, but should receive a fair and reasonable interpretation.

The real inquiry, says Hosmer, Ch. J., in *Hall v. Rand*

Hernandez v. Stilwell.

(8 Conn. 560), is, what was the intention of the defendant; and to ascertain this, his words must be taken in their popular and obvious sense; that is, the true meaning of the contract which readily presents itself to a man of plain understanding on reading it attentively and impartially; and not that which is elaborated with effort.

In *Tuton v. Thayer* (47 How. Pr. 180), the defendant guaranteed the *payment* and *collection* of a note with costs, if any made. It was held that both words were to be taken together; that it was not a guarantee solely of the collection of the note; and that therefore it was not necessary to entitle the plaintiff to exhaust his legal remedy against the debtor; but that if he did so, the defendant, as he had guaranteed the collection, would, as in a guaranty for collection, be answerable, not only for the debt, but also for the costs incurred in the attempt to collect from the principal debtor; but it being a guaranty both of payment and collection, the holder had his election to proceed in the first instance either against the maker or against the guarantor; and if he did proceed against the former, and failed to collect, he had his remedy against the guarantor for the expenses incurred, as well as for the debt. All that can be regarded as held in that case is, that in such a guaranty it is not necessary to exhaust the legal remedy against the principal debtor before resorting to the guaranty. It does not hold that this was an absolute and unconditional undertaking to pay the debt; but recognizes that the relation existed there of a principal debtor and a guarantor; and for all that appears in the case, the defendant may have been notified of the failure of the maker to pay the note upon which his guaranty to pay it would become absolute.

In *Seaver v. Bradley* (6 Me. [6 Greenl.] 60, 64), the instrument sued upon was in these words: "I will be ultimately accountable to you for the sum of \$150, if the said Heald shall purchase goods of you, and should fail to pay you for them."

Heald purchased a bill of goods on a credit of six months, and failing to pay for them, after the expiration of

Hernandez v. Stilwell.

that time, the creditor notified the guarantor of the amount sold to Heald on the faith of the guaranty, and his failure to pay. It was argued in that case that the guarantee was absolute; but the court held that it was not; that the undertaking was conditional. Mellen, C. J., said that the word "ultimately" meant, in that case, that the guarantor would pay if the defendant did not comply with the terms of his engagement; and the defendant having had due notice of the advances that had been made on the faith of the guaranty, and that the debtor had failed to pay for the goods, as he had agreed, at the expiration of six months; that the guaranty, which was before conditional, became absolute when the guarantor was notified of what was advanced on the guarantee; and that Heald had failed to keep his engagement; and this notice having been given before the action was brought, that the plaintiff could recover on the guaranty. The question in the case was, whether the guarantor had been duly notified, there having been some delay in consequence of legal proceedings against the debtor. The court held the notice to be sufficient, as no injury had arisen to the guarantor by the delay; and the action was sustained.

In the present case, gathering the intent from the language used, I understand the obligation to mean that the defendant is to be liable if Remington fails or is unable to pay the bond when it falls due, as the original and principal debtor; and that, to recover against the defendant, it was necessary to aver that payment of the bond had been demanded of Remington, or that he was insolvent, or unable to pay, or something of the kind; and that the defendant was duly notified thereof, whereupon his obligation to pay became absolute.

I think, therefore, that the demurrer to the complaint should have been sustained, and that the order overruling it was erroneous. No injury can arise from such a construction, as the guarantee expresses that it was upon a sufficient consideration.

Osgood v. Glover.

JOSEPH F. DALY, J., concurred.

Order reversed. Demurrer overruled with leave to answer.

GEORGE A. OSGOOD *et al.* As receivers of the Columbian Insurance Company, Appellants, *against* FRANK GLOVER (Impleaded), Respondent.

(Decided January 7th, 1878.)

Where a partner in the ordinary course of business insures property represented to the insurer to belong to the firm, and gives in payment of the premium the firm's promissory note, the other partners are liable on the note, even though the note was given without their consent or knowledge, and in violation of copartnership articles, if there was nothing in the nature of the transaction notifying the insurer of the latter facts.

Where an application was made to an insurance company, through a broker, for insurance, on account of a firm of merchants, on a ship, the loss, if any, payable to the firm, and the company, upon the receipt of the firm's note signed in the name of the firm by one of the partners, issued a policy upon the ship as the property of the firm,—*Held*, that the company were not put upon inquiry as to whether or not the firm owned the ship, or whether or not the insurance was a firm transaction, and that the note bound all the partners, whether part owners of the ship or not.

It seems, that the rule as to the liability of a partner on a firm note, given without his consent or knowledge, in a transaction not connected with the business of the firm, by another partner, is, that if the party taking the note is notified by the nature of the transaction that it is not connected with partnership matters, the partner, not consenting and having no knowledge is not bound.

It seems that a wager policy of insurance, even upon a maritime risk, is void.

The authorities as to notes given by a partner in transactions not connected with the business of the firm, collected and discussed by CHARLES P. DALY, Chief Justice.

APPEAL by plaintiff from a judgment for costs entered in favor of defendant, Glover, upon a dismissal of the complaint as to him, ordered at the trial of the action before Judge JOSEPH F. DALY, and a jury.

The action was against Francisco J. Cortissoz, William

Osgood v. Glover.

St. Anna and Frank Glover, comprising the firm of Cortissoz, St. Anna & Co., on a promissory note made by said firm to their own order, and indorsed to the Columbian Insurance Company. The plaintiffs were the receivers of that company.

The respondent, Glover, defended on the ground that the note had been given without his consent or authority, in violation of the copartnership articles, and in a transaction outside of the firm's business, and also on the ground that the note had been given in payment of a premium on a policy of insurance with the company of which the plaintiffs were receivers, and that the policy had been cancelled about twenty days after the date of the note. The facts shown on the trial in support of this defense are stated in the opinion.

Dudley Field, for appellant.

Francis Byrne, for respondent.

CHARLES P. DALY, Chief Justice.—The note was given in what purported to be a transaction of the firm. An application was made to the company by a broker, that an insurance was wanted by the firm, upon their own account, for \$11,000, on the brig *Milo*, loss, if any, payable to the firm. A policy of insurance upon the vessel was, upon receiving the application, issued to the firm, and the note in suit, which was signed by one of the partners, St. Anna, in the name of the firm, was given to the company for the premium.

The vessel was the individual property of Cortissoz, one of the partners, and for several successive years had previously been insured in his name, although it does not appear where, or that the fact was known to the company. Cortissoz and St. Anna had been previously in business, under the firm name of Cortissoz & St. Anna; but a short time before the policy was applied for Glover became a partner, and the firm name was changed to Cortissoz, St. Anna & Co. The partnership was formed to do business as importers and dealers in brandies, wines and liquors; and as between

themselves, it was agreed that no contract or engagement should be entered into for the business of the copartnership without the consent of all the parties to it. The firm had no interest in the vessel, or any merchandise on board of her, nor dealings of any kind with, nor in respect to her. Glover knew nothing of this insurance, or of the note that had been given for the premium, until long after the failure of the company; and the application for the insurance on behalf of the partnership, and the giving of the note of the firm by St. Anna for the premium, was consequently without the authority of Glover, as the transaction was one not connected with the business of the firm, and of which at the time he had no knowledge.

The rule as respects the liability of copartners upon a note of the firm, given by one of the partners in a transaction not connected with its business, and given without the knowledge or consent of the partner sought to be charged, is the one laid down by Lord Eldon in *Ex parte Bonbonus* (8 Ves. 545), that if the party taking the paper can be considered as "advertised," from the nature of the transaction, that it is not in a matter connected with the partnership, as where it is given for an antecedent debt, the partnership is not bound. After declaring that he could not accede to what was sought to be maintained in that case, that the partnership is not bound where one partner pledges the credit of the firm for his own accommodation, and the money obtained is applied exclusively to his use, Lord Eldon said that if it is manifest to the person advancing the money that it is for the partner's individual use, so that it is against good faith that he should pledge the credit of the firm, then the creditor must show that the partner had authority in the particular transaction to bind the partnership; but if it is in the ordinary course of commercial transactions, as upon a discount, it would be monstrous to hold that the borrowing of the money, upon a bill of exchange, pledging the partnership without any knowledge on the bankers that it is a separate transaction, will not bind the firm, because the money does not go to it, but to the use of the individual partner.

Osgood v. Glover.

The rule may be further illustrated by the leading case in this State of *Livingston v. Roosevelt* (4 Johns. 251), in which it was held that the partnership was not bound upon this state of facts; C. C. & C. J. Roosevelt entered into copartnership under the firm name of C. C. Roosevelt & Co., in the sugar refining business, and the fact that they had formed a partnership to carry on that business, and that their sugar house was in Thames street, was published for two weeks successively in two newspapers, which, it was shown, were taken by the creditor during the time of the advertisement. C. J. Roosevelt purchased of the plaintiff 20 pipes of brandy, and the bill was made out by the plaintiff's clerk to him. The brandy was entered by the plaintiff at the Custom House in C. J. Roosevelt's name to obtain the usual debenture; in which the plaintiff made oath that the sale was to C. J. Roosevelt, and the brandy was exported in a vessel belonging to him. For the purchase a note was given by C. J. Roosevelt, signed by him as maker, but upon which he indorsed the name of the firm, and the note was given, not at the firm's place of business (the sugar house), but at the dwelling-house of C. J. Roosevelt. The plaintiff's clerk understood that the brandy was sold to the partnership, but it appeared that nothing was said at the time of the sale on whose account the purchase was made; all that was proved being, that it was made by and with C. J. Roosevelt without the knowledge or consent of his copartner, and that it was understood between the plaintiff and C. J. Roosevelt, that the partnership obligation was to be given, as it was given, by indorsing the name of the firm on the note made by him.

The court held that as C. J. Roosevelt gave his own note at his own house and not at the counting-house of the partnership, with the indorsement of the firm as collateral security, it was inconsistent with the idea of a sale to the firm, and as the plaintiff himself made oath at the Custom House that the sale was made to C. J. Roosevelt, that he thereby gave the highest and most satisfactory evidence of his understanding of the sale; the court holding that the fair conclusion was, that the plaintiff made the contract with C. J.

Roosevelt individually, and that he wished to obtain the security of the partnership for the payment of what was an individual obligation. This was the conclusion of Van Ness, J., who delivered the opinion of the court; in which conclusion, Kent, Ch. J., concurred, upon the ground that the plaintiff took a partnership security for what he actually knew at the time was the private debt of the particular partner, or under circumstances sufficient to charge him with constructive knowledge of that fact. He held that the inevitable inference from the testimony was, that the plaintiff or his agent actually knew that the purchase was not a partnership concern, and that the partnership was required merely as security; or at least, that the facts disclosed amounted to constructive notice; that it was the individual transaction of C. J. Roosevelt; and he observed that the question in all cases (whether the partnership be special or general) is a question of notice, express or constructive.

All the cases, so far as I have examined them, in which it is held that the firm are not liable upon a partnership note, given by one partner in an individual transaction of his own, having no connection with the business of the firm, have been cases where the creditor either knew it was the individual transaction of the partner giving the note, or where the circumstances were such as to fairly impose upon him the inquiry whether the transaction was in the business of the firm or assented to by the other members. Such, at least, are all the cases referred to in the defendant's points.

In *Williams v. Walbridge* (3 Wend. 415), and *Gansevoort v. Williams* (14 id. 133), the note or indorsement of the firm was given by the partner for an individual debt, due by him to the plaintiff, without the knowledge or consent of his copartners. In the *Bank of Rochester v. Bowen* (7 Wend. 158), the bank knew that the loan for which the partner gave the firm notes was for his individual benefit, and the money in that case was placed to his individual credit in the bank and drawn out upon his check. In *Mercein v. Mack* (10 Wend. 461), the indorsement of the firm was given by

Osgood v. Glover.

one partner to pay the debt of a third person, without the knowledge or consent of the other partner.

In *Wilson v. Williams* (14 Wend. 156), the plaintiff knew that the notes were not made on account of any transaction of the firm, but for the debt or benefit of the maker, who was one of the partners, and were indorsed in the name of the firm by another of the partners; in which the court held that to charge the remaining partner, it was incumbent upon the plaintiff to show that the notes had been indorsed with his assent.

In *Joyce v. Williams* (14 Wend. 141), a draft was drawn upon the firm for goods sold by the plaintiff to a third party, which was accepted by one of the members of the firm. The goods were charged by the plaintiff to the third party, and the draft with the acceptance thereon was taken by him in payment. The court held that the plaintiff could not recover against all the partners, as he knew it was not given for any partnership debt or transaction, without proving that all the partners had assented to it.

In *Gansevoort v. Williams* (14 Wend. 137), Nelson, J., declared that the cases from *Livingston v. Hastie* (2 Caines, 246), down to that time, 1835, were uniform; that where a note or other security is given in the name of the firm by one partner for his private debt, or in a transaction unconnected with the partnership business, and *known to be so by the person taking it*, the other partners are not bound unless they have consented. And in respect to the alleged injustice of subjecting one partner to liability for the act of another to which he never expressly or impliedly consented, he said: "The answer is found upon the law merchant. By entering into partnership each reposes confidence in the other, and constitutes him a general agent as to all the partnership concerns; and the inconvenience to commerce, if it were necessary that the actual consent of each partner should be obtained, or that it should be ascertained that the transaction was for the benefit of the firm in the ordinary transactions of its business, suggested the rule that the act of one, *when it has the appearance of being on behalf of the firm*, is consid-

ered the act of the rest; and whenever a bill is drawn, accepted or indorsed by one of several partners, on behalf of the firm, during its continuance, which comes into the hands of a *bona fide* holder, the partners are liable to him, though in truth one partner only negotiated the bill for his own benefit without the consent of the copartners."

What was there said applies to the present case. The insurance company were *bona fide* holders of the note of the firm. It was given to them in payment of the premium upon a policy of insurance upon the vessel which the company insured upon the account of the firm and made the loss payable to them, as requested. The application was made to them in the ordinary course of business, and they are not to be charged with knowledge of the fact that the vessel belonged to one of the partners only, and that the firm as such, had nothing to do with it. There was nothing to put them upon inquiry as to the ownership, or which imposed upon them the duty, in good faith, of ascertaining whether the firm had any interest in the vessel, or had consented to an insurance of her in their name. The company were not bound to inquire as to the nature of the business which the firm carried on, or if they knew it, they may very well have assumed, when applied to to insure a vessel on their account, that although their business was importing or dealing in liquors they may have owned a vessel, or had an interest in her.

It would be very unreasonable to hold that when a member of a commercial firm sends a broker to an insurance company to obtain an insurance upon a vessel, on account of the firm, that it is the duty of the company, before effecting the insurance, to inquire into the nature of the business of the firm, to see whether the ownership of a vessel, or the having an interest in it, is, or is not, compatible with the business which the firm is engaged in; or to ascertain, before issuing the policy, whether all the partners consent to the insurance and agree to pay the premium. Actual notice that the vessel belonged to one of the firm only, or circumstances equivalent to constructive notice of that fact, would

Osgood v. Glover.

be quite another matter ; but nothing of the kind was shown in this case. It was an application in the ordinary course of business, on behalf of the firm, for an insurance upon property upon their account, which was represented to belong to them, and imposed upon the company no obligation to inquire, when receiving the firm note for the premium, whether the firm owned the vessel or not. (*Mechanics' Bk., &c. v. Foster*, 44 Barb. 87 ; *Connecticut River R. R. v. French*, 6 Allen, 313 ; *Warren v. French*, id. 317.)

In *Hooper v. Lusby* (4 Camp. 66), the defendants, who were partners, doing business under a general firm name, were also part owners in two ships, having each separate shares. One of the partners, and an owner of a separate share, obtained a policy of insurance upon the vessels in the name of the firm, and it was held that the firm was bound for the payment of the premium. "I allow," said Lord Ellenborough, "that one part owner has no implied authority to insure for the others, but I take the distinction to be between part owners and partners." The defendants, he said, carried on business together under a firm name, and the insurances were ordered in the name and on account of the firm. The fact that they were doing business together as partners, under a general name, was deemed sufficient to render them liable for the premium of a policy effected by one of them upon property which each owned separately and not as partners ; and the case could be sustained only on the ground—(*Bell v. Humphries*, 2 Stark R. 354 ; *French v. Foulston*, 5 Burr. 2727)—that when a partner, in the ordinary course of business, insures property represented to the insurer to belong to the firm, the firm are answerable for the payment of the premium, which is the present case.

The respondent is not correct in the assumption that there could be no recovery under this policy, as the firm had no interest in the vessel. If it were not good as a wager policy, being a maritime risk—(*Juliel v. Church*, 2 Johns. Cases, 333 ; *Freeman v. Fulton Life Ins. Co.*, 38 Barb. 258)—which probably it was not, the present tendency of the law

Wagner v. Jones.

being adverse to such policies (*Buchanan v. Ocean Ins. Co.*, 6 Cow. 318; 1 Phillips on Insurance, § 5, and note 3, § 211), one of the partners, at least, Cortissoz, who was the owner of the vessel, could recover upon it in the event of loss, as the real party in interest. (*Lane v. Columbian Ins. Co.*, 2 Code Reporter, 65; *Braik v. Douglas*, 4 My. & Craig, 320.)

The policy was never cancelled, which can be done only by the mutual consent of the insurer and the assured. (*Hill v. Patten*, 8 East. 373; *French v. Patten*, 1 Camp. 73; *Campbell v. Adams*, 38 Barb. 133.) All that appears is that the broker, about twenty days after giving the premium note, called upon the company, and notified the officers to cancel the policy; and by their directions wrote and signed a request to that effect, and left it with the company. It does not appear that any action was taken upon the request by the company, and simply leaving such a request with its officer will not cancel the policy and entitle the insured to a return of the premium note.

The judgment below should be reversed, and a new trial ordered.

VAN HOESEN and LARREMORE, JJ., concurred.

Judgment reversed and new trial ordered.

JOHN F. WAGNER *et al.* Respondents, *against* DAVID JONES, Appellant.

(Decided January 7th, 1878.)

The purchaser, at a sale under an execution, of chattels subject to a mortgage, has the same right to attack the validity of the mortgage as is possessed by the execution creditor, unless the chattels are sold expressly subject to the mortgage.

Where a chattel mortgage obviously contemplates though it does not expressly provide for the consumption of some of the mortgaged chattels by the mortgagor, in the manufacture of beer, the sale of the beer, the use of the proceeds in the business of the mortgagor, the purchase of other chattels to replace those consumed,

Wagner v. Jones.

the continuance of the mortgagor in possession until a breach of condition, and contains a provision that the mortgage covers the chattels to be purchased, it is void as against a creditor of the mortgagor or those succeeding to his rights.

Where there is no appeal from an order denying a motion for a new trial made upon the minutes, the question whether or not the verdict was rendered against the weight of evidence, or on insufficient evidence, cannot be considered on appeal from the judgment.

APPEAL by the defendant from a judgment of this court in favor of the plaintiffs, entered upon a verdict rendered at a trial before Chief Justice CHARLES P. DALY, and a jury.

This action was brought against Jones to recover the value of certain chattels of the plaintiffs, alleged to have been wrongfully taken from plaintiffs' premises and carried away by the defendant, and to recover other damages for such wrongful taking.

The answer was a general denial, and contained a separate defense that the chattels had been mortgaged by one Meyer, a former owner, to Jones; that the mortgage covered specified chattels used in brewing; kegs, beer manufactured and in course of manufacture; and all other goods of Meyer that should be on the premises at the foreclosure of the mortgage, and procured to replace those on the premises, or in addition thereto; that the mortgage was duly filed; that upon default of Meyer to pay the sum secured Jones took possession, and that this was the taking alleged in the complaint.

It appeared upon the trial that the plaintiffs' title to the chattels was obtained by purchase of certain persons, who bought the same at a sale thereof by the U. S. Marshal, under a decree of the U. S. District Court of condemnation and forfeiture, for violation by Meyer of the internal revenue laws.

Smith & Woodward, for appellant.

Westervelt & Greenfield, for respondents.

VAN HOESEN, J.—The defendant did not move for a dis-

Wagner v. Jones.

missal of the complaint, either at the close of the plaintiff's testimony or at the close of all the evidence in the case, nor did he appeal from the order denying his motion for a new trial upon the minutes. The principal, if not the only, ground for the motion for a new trial is, that the verdict was against the weight of evidence. As there was no appeal from the order denying the motion for a new trial, the point that the verdict was against the weight of evidence, or upon insufficient evidence, cannot properly be considered by us. (*Matthews v. Meyberg*, 63 N. Y. 656.) Nevertheless, the counsel for the defendant was, at the time of the argument, so strongly persuaded that the verdict of the jury had done the grossest injustice to his client, that I have thought proper carefully to examine the testimony, with a view to the righting of the wrong, if I should discover that wrong had been done. A sifting of the evidence has satisfied me that the case was disposed of fairly. The amount of the verdict may be greater than some other jury might have awarded, but there is no ground for saying that the damages are excessive. Juries differ as judges do, but the jury who tried this case certainly were not swayed by passion or prejudice in awarding damages to the plaintiff. I find ample testimony to sustain their verdict. It is the right of the jury to discriminate between witnesses, and the defendant has no ground of complaint in the fact that the testimony of the plaintiffs' witnesses was more satisfactory to the jurors than the testimony elicited from his own witnesses.

Passing the objection that the defendant is not entitled now to move for a new trial, because he did not move for a non-suit, or for a direction that the jury find a verdict in his favor, and examining the grounds upon which the defendant seeks to reverse the judgment, I think it is plain that a purchaser, at a sale under an execution, of property subject to a mortgage has the same right to attack the validity of the mortgage that is possessed by the creditor under whose execution the property is sold. (*Hildreth v. Sands*, 2 Johns. Ch. 36; *Porter v. Parmley*, 52 N. Y. 190.) The exception is where the property is sold expressly subject to

Wagner v. Jones.

the mortgage (*same case*). If the purchaser has that right, the only remaining question is, whether the mortgage in question was valid or invalid.

I think it was invalid. The mortgage covered malt, hops, coal, wood, pitch, beer manufactured and in process of manufacture, and all other goods, wares and merchandise, whether enumerated or not, that might be procured to replace any of the chattels on or about the premises or in addition thereto. The mortgagor was a brewer, and the premises referred to were a brewery in which brewing was carried on, with the materials covered by the mortgage. The mortgage obviously contemplates the sale of the beer, the consumption of the malt, hops and fuel, and the introduction of other materials to replace those used and disposed of. The mortgagor was to use the proceeds in his business. The mortgagee was necessarily aware of all this.

It seems to me that the case of *Mitnacht v. Kelly* (5 Abb. Pr. N. S. p. 442) is directly in point, and that the mortgage was void as against the creditors of the mortgagor. The counsel for the defendant contends that there is a distinction between the case last cited and the case at bar, in this, that in the former the mortgage expressly provided that the mortgagor should remain in possession until default in payment of the mortgage debt. The mortgage held by the defendant, though not in terms, yet by necessary implication, contains a provision of like import. The obvious meaning of the mortgage is, that the mortgagor should retain possession until default in payment, or until he should remove the goods, or suffer a judgment to be entered, or an attachment to be issued, against him. Though the conditions upon which the mortgagee might take possession are more numerous in this mortgage than in the mortgage in the *Mitnacht* case, it was the intention of the parties to the mortgage that the mortgagor should keep possession till the happening of an event which would give to the mortgagee the right to take the property. (*Hathaway v. Brama*, 42 N. Y. 325; *Hall v. Sampson*, 35 N. Y. 277.) The right of possession remained in the mortgagor, his interest was subject to levy and sale

Esmond v. Apgar.

under an execution, and the purchaser at such a sale acquired the same right to attack the mortgage which the law gave to the execution creditor.

The learned judge submitted to the jury the question whether the defendant was privy to the sale by Meyer, in the course of his business, of a portion of the property covered by the mortgage. They found that he was, and that he was privy to the use of the proceeds by Meyer in the business of the brewery. The evidence fully sustains the finding.

I have examined the case as I should have been bound to examine it if a motion for a non-suit or for a direction of a verdict had been made at the trial, and if an appeal had been taken from the order denying the motion for a new trial on the minutes; and it will be seen that I should then have been in favor of affirming the judgment.

The judgment should be affirmed with costs.

JOSEPH F. DALY and LARREMORE, JJ., concurred.

Judgment affirmed with costs.*

ROSE L. ESMOND, Respondent, *against* ALLEN S. APGAR,
Appellant.

(Decided January 7th, 1878.)

It is a good defense to an action brought against an assignee in bankruptcy for the conversion of personal property found by him in the bankrupt's possession, and taken and treated by him in good faith as assets of the bankrupt, and as to which the plaintiff's adverse claim existed while it was in the bankrupt's possession, that the action was not brought within two years after the cause of action accrued; And the limitation in such a case is a defense as well in actions brought against the defendant personally as in actions brought against him as assignee.

The statute begins to run from the time the demand for the property upon the assignee is made and refused.

* Affirmed by Court of Appeals.

Esmond v. Appar.

APPEAL by the defendant from a judgment of this court, entered in favor of plaintiff, upon the report of Bradbury C. Chetwood, a referee, to whom it was referred to hear and determine the issues.

This action was brought against the defendant, who was the assignee in bankruptcy of L. Morgan & Son, bankrupts, to recover damages for the conversion of certain shares of stock.

The answer among other defenses set up that the defendant was such assignee; that the stock came into his hands with other property of the bankrupts'; that he held it as collateral to a draft accepted by plaintiff's husband, and for other indebtedness of plaintiff's husband to the said firm; that the stock was sold by defendant by direction of the United States District Court, and that the action was not brought within two years after the accruing of the cause of action.

On the trial it appeared that the defendant, who was assignee, as alleged in his answer, found the certificates in the safe of the bankrupts with the draft, and more than two years before this suit, took them in good faith into his possession as assets of the bankrupts, treated them as assets, and sold them under direction of the United States District Court at public auction as assets. It further appeared, that the title of the bankrupts to the stock was disputed while it was yet in their possession.

William A. Coursen, for appellants.

G. S. Van Pelt, for respondent.

JOSEPH F. DALY, J.—The findings of the referee established that the plaintiff was the owner of two certificates of stock, one for five shares, and one for twenty shares, of the "United States Dairy Company," of the value, at the time of their conversion by defendant, of \$1,000; that the defendant, who was the assignee in bankruptcy of L. Morgan & Son, converted the stock to his own use; and that this action was not brought within two years from the time when

Esmoud v. Appar.

the cause of action accrued, viz.: in February, 1875. The referee refused to find that the acts of defendant in taking, holding and selling the stock were all done in his capacity and official character as assignee, and refused to hold that this action was barred by the statute. (U. S. Rev. Stat. § 5057).

In this I think he erred. The evidence shows conclusively that the defendant assumed the right of holding and selling the plaintiff's stock on no other ground than that it was part of the assets of L. Morgan & Son, of whom he was assignee. Even though the bankrupts had no right whatever to the stock, and it lay in their safe or remained in their possession merely for safe keeping, it was delivered by them to their assignee in bankruptcy, or it was found by him among their other effects, and taken as an asset. When it was demanded of him by plaintiff's agent, he (defendant) claimed no right to hold it except as a collateral to an indebtedness to the assignors, and distinctly based his right to its possession on his appointment as assignee, and he subsequently sold it as assignee, as the referee finds.

This action was commenced against him on April 3, 1877, for a conversion of the stock in February, 1875. The statute above cited declares that: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to, or vested in, such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." The points of the respondent do not inform us what position he took with respect to this limitation, or on what ground the referee disregarded it. The referee expressly found that the cause of action accrued before the last day of February, 1875, and that the action was not brought within two years from that time. The defendant is sued, it is true, personally, and not as assignee, but this is the act of the plaintiff, and cannot deprive defendant of any legal rights. If a sheriff who had taken goods wrongfully were sued personally, and not as sheriff, it would not deprive

Esmond v. Apgar.

him of his right to show that he had a process in his hands and seized the plaintiff's goods under it, and that the action is barred because not brought within three years (Code, § 92; *Dennison v. Plumb*, 18 Barb. 89). It cannot be said that the defendant should be deprived of the benefit of the statute of limitations, because the property he converted never belonged to his assignors and never passed by the assignment. If the property had actually passed by the assignment, that is to say, if the assignors rightfully held it, the plaintiff would have had no action of this character, and it is to bar, after two years, all actions touching the title to property that the statute cited was passed. The language of the enactment is, that no suit shall be brought touching any "property or rights of property" "transferable to or vested in" the assignee. The expression "transferable" signifies that which may be, or is capable of being, transferred; this stock is of such a character, *i. e.*, it would pass by the assignment to an assignee in bankruptcy. If the assignee were protected only from suits touching property in which the assignors had an undoubted right or interest, and which actually passed by the assignment to him, it would exclude the most important cases that might arise in the administration of the trust, and the most onerous of the liabilities the assignee incurs. As there is nothing in the act to warrant the inference of such an intention on the part of the legislators, I construe the section in question in its broadest sense, and deem the limitation of actions against the assignee to extend to all questions of title as to property which comes to his hands from the assignors in bankruptcy by virtue of the assignment, whether the assignors had or had not an assignable interest therein. The question is not, whether the assignors had such an interest, but whether the assignee took and dealt with the property in good faith as property which the assignees had the right to transfer. (*Sedgwick v. Casey*, 4 Nat. Bank Reg. 496; *Smith v. Crawford*, 9 id. 38.) The case of a sheriff who in good faith (even with notice of another's claim of title) takes the property of B. upon an execution against A., bears some analogy to the case

Esmoud v. Apgar.

of an assignee in bankruptcy who holds property transferred to him by the assignment against the true owners of it. The sheriff would be protected by the statute of limitations in his case, which provides for the time within which actions may be brought against him "for the doing of an act in his official capacity in virtue of his office," although his official duty was to take the property of the defendant in the execution, and no other. (*Dennison v. Plumb, supra.*) The analogy between the cases is not, however, complete, for the reason that the assignee in bankruptcy can only claim the benefit of his statute of limitations in actions touching property which came to him by the assignment, and as to which property the adverse claim existed while it was in the hands of the assignors (*Norton v. De la Villebeuve Case*, 13 Nat. Bank Reg. 304; *Re Conant*, 5 Blatchf. 54), although the right to institute the suit against the assignee may not arise until after the bankruptcy. The statute has no reference to cases arising merely out of the dealings of the assignee with the trust property; but was intended to cover questions affecting the amount or extent of the assets. (*Re Conant* above cited.) The present case is one of those clearly embraced within the class thus defined. The stock was in the custody of the assignors before the assignment, *i. e.*, it was deposited in their safe for safe keeping by plaintiff's husband. They claim it was pledged to them as collateral to his obligations. Whether it was so pledged or not was a question upon facts anterior to the assignment, and was the issue in this action. The dispute as to title existed before the assignors delivered the stock to their assignee because the adverse claim then existed; but the *right of action against the assignee* arose after the assignment, that is, upon his refusal to deliver it to the rightful owner on demand. From that time the statute commenced to run; plaintiff had two years in which to invoke her legal remedy against the assignee, and it is her own fault if she neglected to do so until her action was barred.

I think the judgment should be reversed and a new trial ordered, with costs to abide event.

Denison v. Ford.

CHARLES P. DALY, Ch. J., and VAN HOESEN, J., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

THEODORE W. DENISON, Appellant, *against* ROBERT T. FORD, Respondent.

(Decided January 7th, 1878.)

Where the defendant was the proprietor of a building used and let as a market, and leased to the plaintiff "stand No. 46" in such market, and afterwards discontinued the use of the building as a market, induced the other tenants to surrender their stands, extinguished the lights of the market, except those at the plaintiff's stand, and closed the doors of the market, except the one in front of the plaintiff's stand,—*Held*, that he was guilty of an eviction of the plaintiff from the premises leased him.

It seems, that in such a case the measure of damages for the eviction would be the difference between the rent reserved in the lease and the value of the premises after the eviction, together with the rent paid in advance.

APPEAL by the plaintiff from a judgment of the justice of the 8th District Court, in favor of defendant, dismissing the complaint upon the merits.

The facts are stated in the opinion.

JOSEPH F. DALY, J.—Defendant was proprietor of the building on Broadway occupying the front between 44th and 45th streets used and let as a market. Defendant, on April 19, 1871, leased to plaintiff stand No. 46, for the sale of butter, eggs, etc., for six months from May 1st, 1871, and received \$78, three months' rent, in advance. In the latter part of May, defendant resolved to discontinue the public market, as the failure to rent certain stands rendered it unprofitable. He was able to make arrangements with all his tenants (except plaintiff) by which they surrendered their stands about June 1st. Plaintiff insisting upon remaining

Denison v. Ford.

and continuing business, the lights of the market, except those at plaintiff's stall, were extinguished, and the doors of the market, except one door on Broadway in front of plaintiff's stand, were closed. Plaintiff soon found his business diminish, and closed up and removed. This action is brought to recover damages for the interference by defendant with his business, and for eviction. The justice dismissed the complaint, holding that defendant acted in good faith. Whether this latter conclusion were correct or not, defendant may still be liable for the consequence of his agent's acts in the premises. In letting a stand in the market, defendant entered into an implied contract to keep a market during defendant's term, if he could. He would not be answerable if he could not let the stands, but would be if he induced persons holding stands to vacate them so as to depopulate the market. The written agreement for hiring, given to plaintiff by defendant's agent, described the premises let as "stand No. 46, in Broadway market." To close all the stands is to take away the market; and depriving the premises of the characteristics and advantages of a market, including the congregation of dealers and attraction of purchasers, is depriving the lessee of a stand of the very thing he leased, or of the *beneficial* enjoyment of it. Hence there was an eviction when the other stands were closed and no lights nor ingress and egress furnished, except that immediately connected with plaintiff's stand. Physical interference with plaintiff's premises was not necessary to establish a case of eviction. (*Cohen v. Dupont*, 1 Sandf. 260; *Dyett v. Pendleton*, 8 Cowen, 727; *Edgerton v. Page*, 1 Hilt. 320.) Had the landlord, after the letting to plaintiff, induced the other holders of stands to remove, and then turned the premises into a factory or brewery, leaving plaintiff unmolested so far as his physical possession of, and access to, his stand were concerned, but under the necessity of carrying on a market by himself, amid incongruous surroundings, it would hardly be urged that he suffered no loss of the beneficial enjoyment of his stand. The landlord might as well seek profit by such a diversion of the premises from

Van De Wiele v. Callanan.

their use as a market as seek it by closing it up altogether. There is considerable irony in the claim that the plaintiff in his solitary spot in the vast building, his stand lighted by just sufficient lights and accessible by just sufficient places of ingress to accommodate him alone, was enjoying all he had paid for, and all defendant had contracted to give. One stand does not make a market, at least in the sense in which these parties undoubtedly used the word in their agreement.

Plaintiff, if he substantiates his case, is entitled at least to judgment for the rent he had paid in advance, deducting the period he was actually in the beneficial enjoyment of the premises. (*McCleary v. Edwards*, 27 Barb. 239; *Noyes v. Anderson*, 1 Duer, 342.) As defendant, however, willfully deprived plaintiff of the beneficial enjoyment of the premises, the damages should be the difference between the rent payable and the value of the premises after the eviction, together with the rent paid in advance, as above suggested. (*Chatterton v. Fox*, 5 Duer, 64.)

The judgment should be reversed.

CHARLES P. DALY, Ch. J., and VAN HOESSEN, J., concurred.

Judgment reversed.

LOUIS F. VAN DE WIELE, Respondent, *against* LAWRENCE J. CALLANAN, Appellant.

(Decided January 7th, 1878.)

The objection that the complaint, in an action for malicious prosecution, does not allege want of "probable cause," but only of "just" or "proper" cause, although it would, *it seems*, be good upon demurrer or a motion at trial to dismiss the complaint for insufficiency, is not available when raised for the first time upon appeal from an order vacating a dismissal of the complaint and granting a new trial.

In such an action, where the malicious prosecution complained of was the arrest on a criminal charge and the bringing of plaintiff before a magistrate, the evidence that upon his examination before the magistrate the plaintiff executed a

Van De Wiele v. Callanan.

recognizance to appear before the Court of General Sessions, and that in such recognizance it was recited that there appeared to the justice to be probable cause to believe the plaintiff guilty, does not establish conclusively that the magistrate lost jurisdiction of the proceedings, or that there was probable cause, if there is also evidence that the recognizance was not intended to remove the proceedings, that the examination proceeded before the magistrate, and that the plaintiff was discharged.

Since the amendment to the Code in 1851, a judge at trial term may set aside a dismissal of a complaint, in an action tried before him with a jury.

APPEAL by the defendant from an order granting a motion for a new trial on the minutes, and setting aside a dismissal of the complaint, ordered at the trial of the cause before Judge JOSEPH F. DALY, and a jury.

The action was brought for the recovery of \$5,000 damages for an alleged malicious prosecution by the defendant in causing the plaintiff's arrest on a complaint made before Charles A. Flammer, police justice in New York City, charging him with the crime of perjury in falsely swearing to an affidavit of justification in the sum of \$2,000, as surety in an undertaking executed by him, on which an "injunction by order" was allowed by one of the judges of this court, in an action by the plaintiff against the defendant. It appeared, on the trial, that the plaintiff was arrested, as charged in the complaint, and on being taken before the magistrate entered into a recognizance to appear before the next Court of General Sessions, to be held in the city and county of New York, to answer to any indictment that might be prepared against him for said offense, and abide the order of the court and not depart therefrom. After the execution of his recognizance, the magistrate, after an examination of the evidence taken before him, discharged the plaintiff, and on doing so, indorsed on the proofs the following: "While a *prima facie* case of perjury is here presented, and it seems that the justification by the defendant on the undertaking was unwarranted, yet, by the facts set in the whole case as presented, it appears that the assumption by the defendant that he was a freeholder was not a sheer fabrication, but rested upon something that existed in the name of the defendant, which, of course, the complainant was not presumed

Van De Wiele v. Callanan.

to know. The complaint, therefore, is dismissed, and the defendant discharged."

At the close of the plaintiff's evidence the defendant moved for a dismissal of the complaint, on the grounds that the decision of the magistrate established the fact that there was probable cause; that it appeared by the recognizance being executed that the magistrate lost jurisdiction, which was thereby transferred to the Court of General Sessions, and that the proceedings therefore, were not yet ended.

The complaint was thereupon dismissed.

Francis Byrne, for appellant.

D. M. Porter, for respondent.

CHARLES P. DALY, Chief Justice.—The complaint was, in my opinion, defective. The averment of without *just* or *proper* cause, was not equivalent to an averment of want of *probable* cause, for it does not necessarily express the same thing, and could not be substituted for it. But the objection is not available now. It should have been raised either by demurrer or by a motion, at the trial, to dismiss the complaint, as not containing an averment of a sufficient cause of action. (*Fay v. O'Neill*, 36 N. Y. 11.)

If it had appeared that, after the examination of the charge against the plaintiff, the police justice took a recognizance for the plaintiff's appearance at the next Court of General Sessions to answer any indictment that might be preferred against him, I should be prepared to hold that the justice could not then discharge him, but upon the entering into the recognizance that he had no further jurisdiction in the matter. But this is by no means clear upon the evidence, and the case does not essentially differ from *Fay v. O'Neill* (*supra*). In that case, as in this, the recognizance was for the appearance of the accused at the Court of Sessions; but Judge Parker said that it was inconsistent with what appeared by the entries in the minutes showing the adjournment; that the accused was bailed to appear for ex-

amination, and was, at the adjourned day, discharged; that the recognizance was never certified to the Court of Sessions, and was manifestly never used in any way; that it came into the case after the certificate of the clerk, authenticating the proceeding in the court only, without any authentication, and should be regarded as a paper having no significance; and Judge Porter said it was provisional, and fell when the prisoner was discharged; that it was not returned to the Court of Sessions, and that no indictment was found against the plaintiff.

It appears by the plaintiff's testimony in this case that he was arrested in July, and that, after being locked up, he was in the afternoon of the same day released upon bail; that the amount was \$2,000 (which is the amount in the recognizance for his appearance at the Court of Sessions); that the justice, before whom the case came, was absent on vacation or for some other cause; and that the case was prolonged until the early part of October, when he was discharged.

The recognizance is dated on the 25th of July, 1874, and nothing appears in this case respecting it, except that it was found in a package of papers filed in the Police Court. In the same package was found the affidavits upon which the charge was made, and the examination of the plaintiff before the justice; both of which bear date of the same day as the recognizance—25th of July, 1874. There was also in the package a formal discharge of the plaintiff, signed by the justice, which was dated October 23d, 1874, nearly three months after the date of the affidavits, the plaintiff's examination, and the recognizance. As the recognizance was found on file in the Police Court, it evidently had never been returned to the Court of Sessions, as was the case in *Fay v. O'Neill* (*supra*). The discharge shows that the question of the plaintiff's guilt or innocence had been fully considered by the justice, as the discharge expresses it "upon the whole case as presented;" and he refers to circumstances exculpatory of the plaintiff, which do not appear in the affidavit of July 25, 1874, upon which the charge was made: nor in

Van De Wiele v. Callanan.

the plaintiff's examination of that date, showing that there must have been a further investigation before the justice after that date; and further evidence, which may have been mislaid or lost, as appears to have been the case with the warrant upon which the plaintiff was arrested, which could not be found;—nothing having been found on file in the Police Court but the package with the papers above referred to. It may be that the recognizance in question was intended to be taken for the plaintiff's release on bail, pending the investigation of the case by the justice, and that by mistake a printed form for an appearance at the sessions was filled up, signed by the sureties, and acknowledged before the justice, instead of the printed form of recognizance used pending an examination. The plaintiff certainly did not understand that he had been committed for trial, and that his case was, when this recognizance was executed, to go before the grand jury; and that he, if a bill of indictment was found, was to appear at the general sessions, at the next term, for trial; for he swears distinctly that an examination was had on the day when he was released on bail in July; that the complainant testified on that hearing, and that he, the complainant, testified on a *subsequent examination*; and that the case was set down for examination *afterwards*. He further testified that he suffered great agony of mind in consequence of the arrest; and that, to add to his sufferings, the judge before whom the case came was absent; by which it was prolonged to the early part of October. The discharge was in the latter part of October, of which he says he was informed. All this shows that he understood that the matter was pending before the justice; and that the justice so considered it, appears by his signing his discharge on the 25th of October, with a statement of his reasons for dismissing the case. All these facts, I think, indicate that there must have been some mistake in respect to this recognizance; that the justice had not decided, as the recognizance recites, on the 25th of July, 1874, that there was probable cause to believe that the plaintiff was guilty, and had ordered him to find bail for his appearance at the general sessions. As was said in *Fay v.*

O'Neill (supra), the recognizance was inconsistent with the subsequent proceedings; was never certified to the Court of Sessions, and never used in any way. No indictment was found, and the instrument should be regarded, as the recognizance was in that case, as "a paper having no significance." The reasoning in that case fully applies to this; and though *Fay v. O'Neill (supra)* was not probably decided on that ground, for the objection was not taken in the court below, still the fact that the two judges of the Court of Appeals who delivered the opinions of the court in the case, examined the point, and concurred in their views respecting it, is entitled to great consideration; to which little can be added by saying, what is apparent upon reading the opinions, that the disposition which they made of the point was a just and proper one.

The objection is taken that the complaint having been dismissed, no motion could be made before the judge at the special term for a new trial; that the remedy was by an appeal to the general term, and we are referred to *Lusk v. Smith* (8 Barb. 575), in which Judge Gridley said: "It can hardly be doubted that all questions of law arising at the circuit were intended to be heard on appeal, and appeal only." This, however, was said under the Code as it then existed—1850—and before the enactment in 1851 of section 265, providing that motions for a new trial should be heard in the first instance at the special term. As no such provision as this existed in the Code of 1848, or the one of 1849, this remark of Judge Gridley has no bearing, the subsequent enactment having provided for the hearing of motions for a new trial upon exceptions otherwise than on appeal.

In *Jackson v. Fassitt* (33 Barb. 647), Judge Clerke said, that motions for new trials at the special term were evidently restricted to cases in which a verdict had been rendered in trials before juries, upon the ground that the chapter in which the section is contained, allowing motions for new trials at the special term, is headed, "Trials by Jury;" and all the provisions of that chapter, he says, apply only to

Van De Wiele v. Callanan.

that form of trial. These observations are undoubtedly correct, if he meant thereby to distinguish between trials by jury and trials by the court; in which latter case, questions of fact and of law, before the enactment of the Code of the present year, could not be reviewed, except by an appeal to the general term.

In the present case, the trial was not by the court, but it was a trial by jury, in which, after the plaintiff had given all the evidence upon which he relied for a verdict in his favor, the judge, upon a motion made, when the plaintiff rested his case, decided that there was nothing for the jury to pass upon, and granted the motion to dismiss the complaint. The 265th section, under the chapter entitled "Trial by Jury," declares that a motion for a new trial, on a case or exceptions, must, in the first instance, be heard and decided at the circuit or special term. It does not restrict it to a motion for a new trial after verdict, but evidently contemplates that when a cause is heard before a jury, and a nonsuit is granted, or a verdict rendered, the motion for new trial must be made in the first instance at the circuit or the special term; which is more fully carried out by the last enactment of the Code, and applied even to trials by the court; section 1002 providing that in a case not specified in the three preceding sections, a motion for a new trial must, in the first instance, be heard and decided at the special term; with this qualification, however, that where it is founded upon an allegation of error, in a finding of fact, or ruling upon the law, made by the judge upon the trial, it must be heard before that judge, unless he is dead or his term of office has expired, or he specially directs the motion to be heard before another judge. In my opinion, Judge Daly, who tried the cause and dismissed the complaint, in a trial before a jury, had, by the express provision of section 265, as the Code then existed, the right to hear the motion for a new trial.

The order granting the new trial, therefore, should be affirmed.

VAN HOESEN, J., concurred.

Order granting new trial affirmed.

Merrill v. Thomas.

WILLIAM G. MERRILL, JR., Appellant, *against* LUKE W.
THOMAS, *et al.* Respondents.

(Decided January 7th, 1878.)

The interest which a factor has in goods consigned to him under a *del credere* commission is, as against the consignor, as extensive as is necessary for the protection of the factor for his advances and is limited by that necessity, and his right to collect the proceeds of such goods sold by him is not exclusive after his advances and charges are paid, and such right of collection may then be exercised by the consignor.

Debts due such factor for consigned goods sold by him, after his expenses and charges have been paid, do not pass to the assignee of such factor under a general assignment for the benefit of his creditors, so as to give such creditors any interest in the proceeds of their collection, and the assignee cannot be enjoined, at the suit of a creditor of the factor, from paying over to the consignor the proceeds of such debts collected by the assignee.

It seems, that if the factor had collected such debts, and had so mixed the proceeds with his own funds that they could not be distinguished, they would pass to his assignee under a general assignment.

APPEAL from an order of this court at special term, made by Chief Justice CHARLES P. DALY, denying a motion by plaintiff for an injunction pending the action.

The conceded facts of the case appear in the complaint, which recites substantially as follows :

The plaintiff is a general creditor of Thomas & Co., who have made an assignment for the benefit of creditors to the defendant, John L. Hill.

That before the making of the assignment, the firm of Thomas & Co. had certain dealings with the defendants, John Bradbury & Co., Holmes & Ellis, Booth & Miller, The Conversville Company, and The Chambersburgh Woolen Company, which consisted of consignments to them by said firms and corporations respectively, of goods for sale on commission, with the right to sell the same on time at the discretion of Thomas & Co., and upon the mutual agreement

Merrill v. Thomas.

also that said Thomas & Co. would make reasonable advances to said several consignors upon their respective consignments, as might be required, and for an additional percentage, as commission, would guarantee all sales that might be made by them of any of said goods, and should be reimbursed by the consignors certain expenses incurred by Thomas & Co. upon such several consignments.

That at the time of the execution of the assignment to defendant, Hill, Thomas & Co. had made sales unaccounted for of goods so consigned to them by each of the said firms and corporations, so that at that time there had accrued to each of said firms and corporations, upon such account, over and above all advances, commissions and disbursements, a large amount of money, aggregating the sum of one hundred thousand dollars, all of which were proceeds of such sales for such firms and corporations respectively to different purchasers on time, but which the consignor was not entitled, by the terms of the before mentioned agreement, to claim of Thomas & Co. until payment should become due from the purchasers.

That Thomas & Co. so kept their accounts in respect of each of said consignors and their consignments, that the precise goods consigned by each were thereby shown, and also the precise purchaser of each consignment, and of any portion of either, with the date of each sale and its amount, and the credit upon which the sale was made.

That Thomas & Co. made advances to said consignors upon all goods so consigned and sold, and payment for which was not due from the purchasers at the time of the assignment to Hill, which advances were in the form either of acceptances and payments by Thomas & Co. of sight drafts on them, or of acceptances of drafts payable at a future day; that of the latter a large amount are still out and not yet due, having been negotiated by or on account of said consignors.

That the assignee, Hill, has collected from various purchasers of the consigned property the sum of \$25,000, leaving \$75,000 still to be collected, and that said Hill continued

Merrill v. Thomas.

to keep the accounts as they were formerly kept by Thomas & Co.

That each of the said firms and corporations, defendants, claims the proceeds of sales, as they have been or shall be collected by said Hill, are and shall be the property of the consignors, of whose respective consignments such proceeds shall be the yield, and that the balance of such sales, after deducting all proper charges, commissions and advances, shall be paid over to such consignors.

That the assignee threatens to comply with this demand, and an injunction is prayed restraining him from doing so.

The court at special term denied plaintiff's motion for a preliminary injunction, on the ground that plaintiff had no right or equity in the estate or funds, the transfer or disposition of which was sought to be restrained.

T. D. Pelton & John A. Osborne, for appellant.

Moses Ely & Ely & Smith, for respondents.

JOSEPH F. DALY, J.—The theory of the plaintiff is, that the proceeds of the goods consigned to Thomas & Co. are their property, as against the consignors, because of the advances made by them and their guaranty of sales under their *del credere* commission. The consignment to them upon an agreement for advances gave them a vested interest in the goods for their protection and as security for their advances and charges; an interest which enabled them to hold the goods against third parties and the consignor himself, but only so far as was necessary for their protection and security, and their title was a qualified one. (*Grosvenor v. Phillips*, 2 Hill, 147; *Franklyn v. Sprague*, 10 Hun, 589.) They have the same interest in the proceeds of sales that they had in the property sold, a special interest to the extent of their advances. As guarantors under a *del credere* commission they had no exclusive right to collect the proceeds of sales; the consignor might collect them. (*Sherwood v. Stone*, 14 N. Y. 267-270.) Until their advances were repaid they

Merrill v. Thomas.

might have the exclusive right to collect, but if these were repaid, the relation of the consignor to the purchaser of the goods—that of vendor with the right to sue for the price—would be unquestioned. While such a relation exists between the consignor and the purchaser from the factor there can be no such thing as general and exclusive title to goods or proceeds in the factor.

Any confusion on this point arises from adjudications upon section 179 of the Code of Procedure as to the alleged fiduciary character of the relation between consignor and factor, and the right of arrest for failure to pay over the proceeds of consignments. Of this nature, or rather on this question only, are the decisions cited by the appellant in support of his claim of absolute title in the factor as against the consignor. (*German Bank v. Edwards*, 53 N. Y. 541; *Farmers' & Mech. Bk. v. Sprague*, 52 N. Y. 605; *Liddell v. Paton*, 7 Hun, 195.) In all the cases upon the question of arrest of the factor at suit of the principal, the inquiry is, whether the fiduciary relation, *i. e.*, that of personal trust, exists, and the distinction between such trusts and the ordinary relation between consignors and general commission merchants has been pointed out repeatedly. (*Stoll v. King*, 8 How. Pr. 298; *Sutton v. De Camp*, 4 Abb. Pr. N. S. 483; *Clark v. Pinckney*, 50 Barb. 226; *Duguid v. Edwards*, 32 How. Pr. 254.)

If the goods consigned were unsold at the time of the assignment they would not have passed to the assignee. (*White v. Platt*, 5 Denio, 269-273.) It might be that moneys collected from sales under such consignments, if in the possession of the assignor at the time of the assignment and mingled with his other funds, would pass to the assignee; but I regard the case to be different where the assignee proceeds to collect the proceeds of such sales and to pay them over to each consignor according to the latter's separate consignment account. Each consignor might have made such collections himself for sales of his own goods if the factor had not the special property therein for his advances. The title to the proceeds of the sales is not divested

Hill v. Conkling.

from the consignor, as I understand it, unless the factor, as he may, chooses to mix them with his own funds and to use them as the exigencies of his business require. (*White v. Platt, supra.*) Had the factor collected the proceeds of sales and deposited them in a separate account for the consignor, they would have been treated as trust funds and would not have passed to the assignee. The assignee has not the power which his assignor had to mix the collections he makes with the other funds of the estate and thus to destroy the character of the title to them and subject them to the payment of the creditors at large. This is the power or privilege of the factor, but not of his assignee.

For these reasons I regard the disposition of the moneys collected by the assignee as proposed by the latter eminently proper, and think the order of the special term should be affirmed with costs.

VAN HOESEN and LARREMORE, JJ., concurred.

Order affirmed with costs.

BENJAMIN S. HILL, Respondent *against* FREDERICK A.
CONKLING *et al.* Appellants.

(Decided January 7th, 1877.)

In an action against a stockholder of a corporation organized under the Manufacturing Companies' act of 1848, for wages due a servant from the corporation, the complaint must contain allegations showing that the sum contracted to be paid was, by the terms of the contract, payable within twelve months from the time of the contracting of the debt.

In such an action a complaint stating only that plaintiff "was a servant and laborer of said corporation between the 15th day of June, 1874, and the 29th day of January, 1876, and in that capacity rendered services to said corporation, and which services were reasonably worth, and the said corporation agreed to pay this plaintiff therefor, the sum of \$246 07, which sum became due and owing this plaintiff by said corporation on the said 29th day of January, 1876," is insufficient on demurrer as not stating facts sufficient to form a cause of action.

Hill v. Conkling.

APPEAL from a judgment of this court in favor of the plaintiff, for \$334 87, entered on a decision made at special term by Judge Robinson, overruling a demurrer to the complaint

The facts appear in the opinion.

Henry E. Davies, Jr., & G. Irvine Whitehead, for appellant.

Paul Fuller & Frederick Hemming, for respondent.

JOSEPH F. DALY, J.—The complaint alleged as cause of action against defendants, who were stockholders in the Secor Sewing Machine Co., that the plaintiff “was a servant and laborer of said corporation between the 15th day of June, 1874, and the 29th day of January, 1876, and in that capacity rendered services to said corporation, and which services were reasonably worth, and the said corporation agreed to pay this plaintiff therefor, the sum of \$246 07, which sum became due and owing to this plaintiff by said corporation on the said 29th day of January, 1876.” This was a claim for nineteen months’ services, but it nowhere appears in the complaint whether the sum contracted to be paid for such services was payable by the contract at the end of the nineteen months or sooner; it certainly does not appear that it was payable within twelve months after the services were rendered. The utmost that could be inferred from the complaint is, that as to the last twelve months’ service the payment was to be made at the expiration of twelve months, since the allegation is, that the pay became due on the last day of service; but the conclusion is just as good, that the contract was for nineteen months’ services, payment to be made at the end of that period—in which case defendant would not be liable. Section 24 of the act of 1848, chapter 40, provides, that no stockholder shall be personally liable for the payment of any debt contracted by the company which is not to be paid within one year from the time the debt is contracted. If the plaintiff were to be paid for his services by the year he could recover, or if he

Howe Machine Co. v. Robinson.

were to be paid at stated periods less than a year he could recover. But this is not the allegation of the complaint, which in no wise brings plaintiff's contract with the company within the terms of such contracts as are enforceable against a stockholder. (*Hovey v. Ten Broeck*, 3 Robt. 316.)

The act of 1875, sec. 25, cited by plaintiff on his points, is not the statute under which the corporation of which defendant is a stockholder was formed. The provisions of the act of 1875 apply only to suits against stockholders of corporations organized under that act. (Laws of 1875, chap. 611, sec. 25.)

The judgment should be reversed with costs, and defendant should have judgment on his demurrer with costs, with leave to plaintiff to serve an amended complaint within twenty days after service of order.

CHARLES P. DALY, Ch. J., concurred.

Ordered accordingly.

THE HOWE MACHINE COMPANY, Appellant, *against*
JOHN ROBINSON, Respondent.

(Decided January 7th, 1878.)

Where a corporation organized by or under any statute of this State, in a suit by it desires to take advantage of the statutory provisions (2 R. S. 458, § 3, as amended by L. 1864, c. 422, and L. 1875, c. 508) relieving such corporations under certain circumstances from proving on the trial of suits by or against them, the existence of such corporation, it must allege in its complaint its incorporation by or under a statute of this State, and if it does not do so it must, on a general denial being interposed, prove its incorporation on the trial.

Even in a case where the defendant, by having contracted with the plaintiff in its corporate name, is estopped from denying its incorporation, this only extends to estop him from denying the incorporation where properly pleaded, and the plaintiff must still either properly allege the incorporation in its complaint or prove it on the trial, if a general denial be interposed.

A complaint in the name of a corporation as plaintiff is a sufficient allegation of incorporation to sustain the action, provided due proof of such incorporation is made when required.

Howe Machine Co. v. Robinson.

APPEAL from a judgment of the justice of the District Court of the city of New York, for the Sixth Judicial District, dismissing the complaint.

The facts are fully stated in the opinion.

Stephen A. Walker, for appellant.

S. Albert Mincho, for respondent.

JOSEPH F. DALY, J.—This was an action to recover personal property, one sewing machine. The complaint was oral and did not aver that the plaintiff was a corporation. The answer contained a general denial with other defenses. The affidavit and undertaking of plaintiff on the claim of the property with the requisition to the marshal were before the justice on the trial, and are made part of his return. The affidavit is made by "Levi S. Stockwell, president of the Howe Machine Company." The undertaking recites the affidavit so made. Plaintiff did not prove its incorporation on the trial, and the justice granted defendant's motion to dismiss the complaint, which motion was made "on the ground that no incorporation has been proved; also on the ground that no sufficient demand is shown, the plaintiff not having shown any demand since the machine had been sent up to defendant's place."

It was not necessary to aver particularly in the complaint the incorporation of the plaintiff. The complaint by the Howe Machine Company is itself an allegation of incorporation, and is sufficient as a pleading. (*The Phenix Bank v. Donnell*, 40 N. Y. 410; *The Bank of Havana v. Magee*, 20 N. Y. 358, per Denio, J.)

If there were no special averment of incorporation, did the general denial in defendant's answer require proof of incorporation on the trial? Such a denial would not put in issue the incorporation of a company averred in the complaint to be a domestic corporation. (2 R. S. 458, § 3, L. 1864, chap. 422; L. 1875, c. 508, p. 588.) But it would put in issue an averment of incorporation under a foreign law.

Even if the contract on which the action is brought were made by defendant with the corporation in its corporate name, he is estopped no further than his right to object to the want of averments of incorporation in the complaint, for, under the general issue, the court would require proof of plaintiff's capacity to sue if it were a foreign corporation. (*Henriques v. Dutch West India Co.*, 2 Raymond, 1535; *The Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238; *Connecticut Bank v. Smith*, 9 Abb. 168.) This was the rule before the statute above cited as to corporations generally, but by the statute proof of incorporation by domestic corporations is not required under the general denial. The rule as to foreign corporations has not been altered.

When the parties went to trial in the court below the plaintiff was not in a condition to avail itself of the benefit of the statutes dispensing with proof of its incorporation, because it had not, in any form, claimed to be a domestic corporation, and there could be no presumption that it was such. Even the incorporation of plaintiff was denied; and if the defendant was estopped from denying that, because he had contracted with plaintiff, he was estopped no further than as regards the pleading. We have seen that plaintiff would have to prove incorporation on the trial. (*Dutchess Cotton Mfg. Co. v. Davis*; *Henriques v. Dutch West India Co.*, *supra*.)

If plaintiff were a domestic corporation it was only necessary to so allege, and unless that fact were specially controverted no further proof would be required. Not having chosen to aver incorporation it was necessary to prove it. If we held otherwise it would be in effect permitting a foreign corporation, by omitting all averments of these matters in its complaint, to recover without any proof of corporate existence, notwithstanding a general denial in the answer. This would be a clear infraction of the rule as to proof under such an issue by such corporate bodies. That we hold a domestic corporation, on the other hand, bound to prove its corporate existence, without any special denial required by the statutes, is no violation of those statutes,

Meacham v. Collignon.

because, without an averment in the complaint the court cannot know that it is a domestic corporation and entitled to its privilege under the acts. Nothing in the pleadings or proofs in this case showed plaintiff to be a domestic corporation. Defendant was not bound to set up expressly in his answer that plaintiff was not a domestic corporation, for such special denial is only required where the action is brought by a domestic corporation, and that fact nowhere appears.

The judgment dismissing the complaint for the want of proof of incorporation should be affirmed.

VAN HOESSEN, J., concurred.

Judgment affirmed.

GEORGE L. MEACHAM *et al.* Appellants, *against* AUGUST M. COLLIGNON (Impleaded), Respondent.

(Decided January 7th, 1878.)

Where the defendant was a creditor to a large amount of his nephew, who was engaged in buying goods on credit and shipping them to Europe for resale, and the nephew had no funds of his own but relied for funds to pay for the goods he purchased, on money advanced to him by the defendant, in whose name the bills of lading were taken, and after a number of such purchases, shipments and advances by the defendant had been made and there had been a loss on the shipments so that the defendant had not received back his advances in full, a large quantity of goods were purchased on credit and shipped and the bills of lading made out to the defendant, who made no advances thereon but collected the proceeds of sale and applied them to the balance due for former advances and on account of an old debt due to him from his nephew,—*Held*, that these facts were sufficient to show that the defendant's nephew bought the goods with the fraudulent design of never paying for them, and that the defendant had knowledge thereof.

Where the third party receiving goods has guilty knowledge of the fraud by which they were obtained, no notice of rescission of the sale need be given him by the person defrauded before action brought; a simple demand for the goods is sufficient.

An action for the wrongful detention of the goods, or for their value, will lie

Meacham v. Collignon.

against the person receiving them from the fraudulent vendee with knowledge of the fraud, although such person may have parted with the goods before action brought. *Roberts v. Randel*, 3 Sand. 707, distinguished.

APPEAL by plaintiffs from an order of the court made at special term by Judge LARREMORE, granting the defendant, Collignon, a new trial.

The action was brought to recover from defendants possession of 200 barrels of apples, or if possession could not be had, for \$800, the value thereof, and damages. Plaintiffs claimed that the apples had been procured from them by Campbell by fraud, and delivered by Campbell to Collignon without consideration and with notice on the latter's part of the said fraud. The jury found against both defendants; but a motion for a new trial upon the minutes of the judge was made by Collignon, and subsequently granted on the ground that the verdict as to him was against the evidence.

Cheevey & Clark, for appellants.

Robert W. Todd, for respondent.

JOSEPH F. DALY, J.—I have seldom known the verdict of a jury upon a question of fraud in a mercantile transaction to be without good legal evidence as well as sound legal inferences to sustain it. The shrewd common sense of the men in the jury box can hardly lead to wrong conclusions in a matter so wisely left by law to their determination. The present case is no exception to the rule that jurors are the best judges of the facts—especially where, as in nearly every case of fraud, these facts are to be gathered from a variety of circumstances and are seldom susceptible of direct proof.

Campbell was a dealer in apples and produce in the basement of No. 298 Washington street, where he had been in business some three years. In November, 1875, he was indebted to his uncle, Collignon, to the amount of about \$2,000. Along about the latter part of November or first of December, 1875, he went to his uncle and said he would like to

Meacham v. Collignon.

ship apples to Europe, and asked if his uncle would make advances on the bills of lading if he would turn the bills over him, ship the apples in his name, and allow his carts to do the shipping at the usual market rate; Collignon said he would do so and put the apples on ship and make an advance on each shipment; each shipment to cover advances made on it specifically and to secure or cover losses on account of advances made on prior shipments; the advances were to be about the New York prices and to be made sometimes on delivery of the goods and sometimes in ten days. At the outset, this arrangement and the circumstances surrounding it support the conclusion that Collignon knew that his nephew must obtain the apples to ship on credit, and must pay for them out of the advances, which, for the purpose of enabling such payment, were to be "about New York prices;" also, that Collignon was aware that he and Campbell were thus engaging in a speculation with property obtained on credit, and that whenever it became necessary under their agreement that he should hold a shipment to cover losses on prior shipments, he was simply making himself secure on his own speculation with property obtained on trust and on a credit fostered by his own acts. With provision thus made against the future and possible loss in the business, by a reserve of other people's goods, active operations were commenced and continued until Campbell "failed" about March 6th, 1876, a period of about four months. During this period, beginning with 50 barrels of apples on December 14th, 1875, and ending with 175 barrels on March 3, 1876, Campbell turned over to Collignon 3,175 barrels, on which there were advanced to him: cash, \$5,559 28; in merchandise, \$2,680 80; cartage charges, etc., \$251 95; making a total of \$8,492 03. The net proceeds of the apples was \$9,564 94, leaving a balance of \$1,072 91, which Collignon has applied on the old indebtedness of \$2,000 existing from Campbell to him before these transactions began. Notwithstanding the balance thus left in Campbell's favor and applied by Collignon on the old debt, it must not be supposed that the apple venture was a suc-

Meacham v. Collignon.

cess ; in fact there was a dead loss of \$2,447 28, the net cost of the 3,175 barrels being \$11,756 66, and the net proceeds, as we have seen, but \$9,564 94. The explanation of Collignon's coming out of the transactions with his advances paid up and a balance to apply on the old debt is found in the fact that on the last four shipments, amounting to 875 barrels, he made no advances at all, but applied their proceeds to cover losses on the prior shipments under the provision of the agreement between Campbell and himself to that effect. The plaintiffs in this action find themselves, to the amount of 200 barrels, among the victims selected to make up Collignon's deficiency when it became necessary for him and Campbell to protect him from loss. His last advance was made on February 15th, on 200 barrels ; he received on the 18th, 200 barrels more ; on the 22d, 200 barrels ; on the 26th, 300 barrels, and on March 3d, 175 barrels. These were made up from purchases by Campbell from the plaintiffs on February 18th and 25th,—100 barrels on each date,—and from purchases of 963 barrels more at various dates from February 16th to March 3d, and from eleven different vendors. These purchases were all for cash and have not been paid for. There was, besides, at the time Campbell obtained them, no means or prospect of paying for them, except from advances which Collignon might make upon them. If they were purchased by Campbell with the intention of merely turning them over to Collignon to make the latter safe on his general account for advances, and therefore with the knowledge that he could not and would not pay for them, they were procured by fraud ; and if Collignon received them with notice or knowledge of that intention and design on Campbell's part, or received them in pursuance of a scheme involving the perpetration of just such a fraud, he is not a *bona fide* purchaser and acquired no title to them. On March 6th, three days after the last shipment, Campbell announced to such of his creditors as sought him to demand payment, that he had not been able to obtain advances on the shipments because of heavy losses on prior shipments. At how early a date Collignon knew there were

Meacham v. Collignon.

heavy losses on prior shipments does not directly appear. He knew it when the last shipment was made to him (March 3d), because he then, according to Campbell's testimony, refused advances on the last four shipments, on the ground of "heavy losses on the last four shipments." He probably knew it on March 2d, for on that day Campbell gave him a check for \$175, thus exhausting his bank account except a balance of less than two dollars. It is probable that he knew it before, if the evidence is not conclusive on that point, for his own accounts show that out of the fifteen shipments from December 14th to February 12th there was a loss on thirteen of them, amounting to \$1,601 24, and a profit on but two, amounting to \$71 18. Up to the February 5th shipment there had been but one profitable venture, netting \$56 46, and a loss on all the others amounting to \$905 97. There was enough in this account to justify the jury in finding that according to the course of commercial transactions Collignon knew on February 18th that he was largely behind on his ventures, and that a considerable amount of goods must be procured to save him from ultimate loss. Between the 18th and the ensuing 3d of March, therefore, we find him receiving 875 barrels of apples, taken by his own carts direct from the vendors, having been procured for him on and between those dates by Campbell, and shipped without any advances. These shipments, at cost, in New York, amounted to \$3,357 88; sales of them show a net loss of \$370 37; thus yielding him sufficient to balance his account for advances and to credit, in addition, a balance of \$1,072 91 on his nephew's old indebtedness.

On these facts I deem the conclusion reached by the jury a sound one, and think their verdict should not have been disturbed, because it was manifest that Campbell bought the goods from plaintiffs with the preconceived intention of not paying for them but of putting them into Collignon's hands to cover prior losses; and Collignon had distinct notice of the fact when he got them.

Not being a purchaser in good faith nor for a valuable consideration, but a transferee with full knowledge of the

Meacham v. Collignon.

fraud, Collignon cannot hold the goods for prior advances, no matter how reasonable and usual (in fair cases) such an agreement as he made with Campbell to that effect might be; nor is he entitled to any credit for cartage and other expenses, but is bound to return the goods or their value to the wronged vendors rescinding the sale, without any deductions or credits to him whatever. A naked demand of him was proper without any tender and without setting forth grounds for the demand or giving notice of rescission. These requirements or formalities are necessary only in cases where there is no pretence that the transferee of the fraudulent purchaser has guilty knowledge. (*Bliss et al. v. Cottle*, 32 Barb. 322; *Keyser v. Harbeck*, 3 Duer, 373.) The action was properly brought for the wrongful detention of plaintiff's goods, and for the recovery of the goods or their value. Plaintiffs were not bound to know that Collignon had shipped the apples before suit was brought; they saw them taken by his carts, and the fact that he shows a parting with the possession to others before demand will not defeat the action. The authority quoted by defendant's counsel on this point (*Roberts v. Randel*, 3 Sand. 707) refers to a complaint in which it is distinctly averred that defendant had parted with the goods several months before suit was brought; and yet the specific property was claimed, a requisition issued for it, an order of arrest issued for "concealing or disposing of it so that it could not be found by the sheriff," which order was set aside. In this case the possession of the goods was alleged to be in defendant; if he show they are not, he is still liable for the value if possession cannot be restored.

Defendant raises a last question on the well known rule of law that a party defrauded must rescind at the earliest practicable moment; and insists that the delay of 30 days by plaintiffs before making demand is fatal. The rule as to prompt notice of rescission is only applicable where the party electing to disaffirm has received some benefit or advantage under the contract, which he enjoys as long as he pleases and then attempts to throw up in the hope of obtain-

Solinger v. Patrick.

ing greater advantages (*Masson v. Bovet*, 1 Denio, 69; *Bruce v. Davenport*, 1 Abb. Ct. App. Dec. 233), or where the position of the parties has so changed during the delay of the person entitled to rescind as to make it inequitable to permit his final election to disaffirm. This case presents no such features. Plaintiffs got nothing by the contract they were induced to enter into by the fraud of Campbell; and Collignon, if he had sold the apples during the 30 days' delay of plaintiffs to demand them, still had the proceeds.

On all the points I am in favor of reversing the order for a new trial, with costs.

CHARLES P. DALY, Ch. J., concurred.

Order granting new trial reversed, with costs.

DAVID SOLINGER *et al.* Respondents, *against* WILLIAM H. PATRICK *et al.* Appellants.

(Decided January 7th, 1878.)

The statutes giving jurisdiction to District Courts in actions commenced by process of attachment must be strictly followed, or jurisdiction will not be acquired.

An affidavit stating only that the defendant is indebted to the attaching creditor in a sum named "over and above all discounts," is insufficient to sustain the process, and both that and all subsequent proceedings are without jurisdiction. The affidavit should state the amount of the indebtedness "over all payments and set-offs."

It seems, that such process of attachment, if issued against defendants, designating them by a fictitious name, would not give the justice jurisdiction.

APPEAL from a judgment, entered upon a verdict of a jury, rendered for plaintiffs at a trial before the justice of the District Court of the city of New York for the Seventh Judicial District Court.

The action was commenced by attachment. The application annexed to the affidavit on which the attachment was

Solinger v. Patrick.

granted designated the persons against whose property the attachment was desired as "John Patrick and Richard Scherer, whose first names are unknown to subscribers." The affidavit designated them as "Patrick and Scherer," and stated that they were indebted to the plaintiffs "in the sum of two hundred and fifty, over and above all discounts which the said Patrick and Scherer have against them," the plaintiffs. On the return day of the attachment, the defendant Scherer appeared specially and moved to dismiss the proceedings, for want of jurisdiction. The motion, which by consent was heard upon an adjourned day, was denied. Both defendants appealed from the judgment, alleging, among other grounds of appeal, the want of jurisdiction.

James Henderson, for appellants.

H. Steinert, for respondents.

CHARLES P. DALY, Chief Justice.—The motion to vacate the attachment should have been granted. The authority given to the District Court to proceed against a party by attachment is derived from the act of 1831 (L. 1831, pp. 403, 404, 405) and the act of 1857 (L. 1857, Vol. I., pp. 713, 714, c. 344, §§ 20–23); and the authority can be exercised only in the cases, and in the manner provided for in these statutes. By the act of 1857 (§ 21), the party applying must prove by affidavit, to the satisfaction of the court, the amount of his debt or claim, "over all payments and set-offs." All that was stated in the affidavit was, that the defendants were indebted to the plaintiffs in the sum of two hundred and fifty. The word "dollars" was, no doubt, intended to have been inserted; but if it had been, the affidavit would still have been defective, for the want of the averment that the debt or claim was the amount stated, "*over all payments and set-offs.*" The affidavit, which is a printed form, was the one in use under the act of 1831, and follows the words of that act, "over and above all discounts." Whereas, the sub-

The United States Reflector Co. v. Rushton.

sequent act of 1857 changed this language, and requires that the proof by affidavit shall be of the amount of the debt or claim "over all payments and set-offs," and such proof is now necessary to authorize an attachment. The attachment is an original process by which the suit is commenced, and a strict compliance with the requirements of the statutes under which the proceedings are had is necessary to confer jurisdiction. (*Furman v. Walter*, 13 How. Pr. 348.) There is a further objection, that no authority is given to the District Courts to issue such attachments against defendants by fictitious names, as was done in this case; but it is unnecessary to dwell on that point, as the affidavit was otherwise defective in not setting forth the amount of the plaintiff's debt or claim, "over all payments and set-offs." Upon such an affidavit, the court had no jurisdiction to issue an attachment. The judgment, embracing the attachment and all proceedings under it, must therefore be reversed.

VAN HOESSEN, J., concurred.

Judgment reversed.

THE UNITED STATES REFLECTOR COMPANY, Respondents,
against JOHN C. RUSHTON, Appellant.

(Decided January 7th, 1878.)

Where the defendant, at the close of plaintiff's case, without any cross-examination of plaintiff's only witness, and without offering any evidence in defense, requests the court to direct a verdict for the defendant, he admits the facts testified to and all facts which may reasonably be inferred from them.

In such a case, where the only evidence to prove a sale and delivery was, that plaintiff's clerk, who knew defendant, sold him four chandeliers at the price of \$150, that he made a deduction of 10 per cent. in consideration of cash, which was to have been paid as soon as they were put up, that the amount was \$180, that the chandeliers were delivered and were not paid for, it will be inferred that the defendant saw the chandeliers, that they were put up, that defendant made no ob-

The United States Reflector Co. v. Rushton.

jection to them, and such inferences being made in this case, it was *Held* that there was an acceptance within the meaning of the Statute of Frauds.

The authorities upon the subject of receipt and acceptance under the statute of frauds, collated and considered. Per CHARLES P. DALY, Chief Justice.

APPEAL from a judgment in favor of the plaintiff, entered upon a verdict rendered by direction of the court at a trial before Judge VAN HOESEN and a jury.

This action, originally commenced in the Sixth District Court of the city of New York, and afterwards removed into this court, was brought by the plaintiff, a corporation, to recover the price of goods sold and delivered to the defendant. After evidence had been given of the corporate character of plaintiff, the only evidence in the case of the sale and delivery of the goods was introduced, and was as follows:

Q. Mr. Corbit, what is your business?

A. I am a clerk in the employ of the United States Reflector Company.

Q. Do you know the defendant?

A. Yes.

Q. Did you, in May, 1876, as agent of the Reflector Company, sell the defendant any goods, and if so, what?

A. I sold him four chandeliers at the price of \$150; and in consideration of cash, which he was to have paid me as soon as they were put up, I made a deduction of 10 per cent.

Q. The total amount is what?

A. \$180.

Q. Were these chandeliers delivered?

A. They were.

Q. Have they been paid for?

A. No, sir.

The plaintiff then rested. The defendant rested. The defendant then asked the court to direct a verdict for the defendant, on the ground that no acceptance was shown. This request was refused and the defendant excepted. The court directed a verdict for the plaintiff, and defendant excepted.

The United States Reflector Co. v. Rushton.

Edward Van Ness, for appellant.

F. L. Minton, for respondent.

CHARLES P. DALY, Chief Justice.—The evidence in this case, which was very brief, was, that the plaintiff's clerk sold to the defendant four chandeliers for \$180, which amount the defendant was to pay, less a deduction of ten per cent., as soon as the chandeliers were put up. The clerk was asked if they were delivered, and he answered that "they were," and to the further question "Have they been paid for?" he answered "No." This was all the evidence. In my judgment, it was sufficient to show a delivery and acceptance under the Statute of Frauds in the absence of any evidence of objection, complaint, dissatisfaction, or any thing of that kind, on the part of the defendant. The defendant did not see fit to ask the clerk, who was the only witness, any further question, and offered no evidence on his own behalf. It was not, as may be inferred from the evidence, the sale of an article to be manufactured or in respect to which something was to be done, but the sale of four chandeliers, a specific article, which the defendant saw and for which he agreed to pay a certain sum when they were put up. From the clerk's broad statement that they were delivered, and the omission of the defendant to ask the clerk any question, the inference must be that they were put up, without which there would have been no delivery. If the evidence is very general, and in the nature of a conclusion, it does not lie with the defendant to complain, who neither objected to the form of the question nor asked any questions of the witness, who, if specifically interrogated, might, for all that appears, have detailed exactly what took place in respect to the delivery.

It was held in *Cross v. O'Donnell* (44 N. Y. 661), affirming the judgment of this court, that the defendants accepted a lot of hoops, because one of them saw them in the plaintiff's yard in Baltimore, and the contract had reference to the particular lot of hoops which he saw, and which the plain-

tiffs, as they had been directed, delivered on board of a vessel for New York, which was lost with her cargo. The fact that the defendant agreed to take the identical hoops which he saw in the plaintiff's yard, at the price agreed upon, was deemed an acceptance, within the meaning of the statute, there being, said the judge who delivered the opinion of the Court of Appeals, nothing in the statute which requires that the acceptance and the receiving shall be at the same time. Either, he said, may precede the other; and after both have concurred, the statute is complied with. Which was also declared to be the true construction of the statute by Lord Campbell in *Morton v. Tibbett* (15 Adol. & Ell. N. S. 428), who said, that acceptance is to be something which is to precede or to be contemporaneous with the actual receipt of the goods. In fact, the legislature struck out the provision of the revisors that the acceptance and receipt of part of the goods should be at the same time.

In *Outwater v. Dodge* (6 Wend. 402), Judge Sutherland refers to the distinction drawn by Roberts in his work on frauds; that where the verbal order is particular as to the goods, it seems to furnish plausible ground for contending that such selection of the goods may amount to an acceptance, with which the actual delivery, although posterior in point of time, might be coupled by relation, so as to put the whole transaction out of the operation of the statute; but that where the verbal order is for goods of such a price and quality to be sent, it does not satisfy the statute that goods of that quality and price were sent, there being nothing in that case to show the acceptance of them as conforming to the order; but when the identical goods are fixed upon, there is then something to show acceptance, by the acts of the vendor.

There is nothing in *Caulkins v. Hellman* (47 N. Y. 449), upon which the appellant relies, in conflict with this. Judge Rapallo says, some act or conduct on the part of the vendee manifesting an intention to accept the goods as a performance of the contract, and to appropriate them, is required to satisfy the statute; and all this is supplied when the vendee

The United States Reflector Co. v. Rushton.

selects a particular article and agrees to pay a certain price for it when it is delivered ; for when it is delivered, it is the article which he accepted, and agreed to pay the stipulated price for. If the acceptance had to be, by some act, upon or after the delivery of the article, it might be otherwise ; but it being held by the court of last resort that the acceptance may precede the delivery, there is, in such a case, a previous act of the buyer showing his acceptance of the identical article.

In *Caulkins v. Hellman*, in which Judge Rapallo gave this opinion, there was no prior acceptance, nor any thing from which it could be inferred. So far as the facts appear, from Judge Rapallo's opinion, the verbal agreement was for wine in casks, which had been purchased by sample. The casks were delivered at the railroad station, from whence they were sent to the plaintiff in New York, where they were received by him, and deposited in his cellar, but not accepted as corresponding with the sample, for the defendant immediately, upon the receipt of the wine, attempted to send a telegram to the plaintiff, to the effect that he declined to accept the wine—which the judge, erroneously as was held, excluded upon the trial, because, though it never reached the plaintiff, it bore upon the question of the acceptance of the wine, and was an act on his part explaining and qualifying his conduct in receiving the wine into his cellar. The defendant in that case was not concluded by the sending of the wine to him by railroad, and by putting it in his cellar when it came, as he had the right to refuse it, if, in his opinion, it did not conform to the sample, and as there was no agreement in writing, and could be no valid contract unless he accepted the wine when it was sent to him ; he was not bound ; there never having been any act on his part manifesting any intention to accept the wine, as corresponding with the sample, either before or after it was delivered to him,—which was all that was decided in that case. The judgment was reversed, because the judge not only excluded the evidence of the defendant's non-acceptance, but submitted but two questions to the jury—whether the wine

delivered at the railroad station was in good order and like the sample exhibited; and whether the defendant accepted it when it reached New York;—leaving to them the question of acceptance, in the absence of any evidence of it, and after having excluded evidence of the defendant's acts expressing his dissent immediately upon receiving the wine in New York.

There can be no acceptance as long as the buyer has the right to object to the quality of the goods; and he is not precluded from objecting because they are sent by a particular conveyance, or because they are left at his premises. (*Norman v. Phillips*, 14 Mees. & W. 279.) As was said in the case last cited, he is precluded from objecting where, instead of sending the goods back, or expressing his unwillingness to accept them, he keeps and uses them; which, so far as we are able to judge from the evidence, appears to have been the case here, as the chandeliers were delivered to the defendant and he has never paid for them. If, after they were delivered, he was dissatisfied with them and unwilling to accept them, it was a very easy matter to have shown the fact; as he could himself have been a witness. It is well settled that when the right of approval exists, as where an article of a particular quality or kind is ordered, the buyer must refuse to accept in a reasonable time; and if he does not, he is treated as having accepted them. (*Coleman v. Gibson*, 1 Moo. & R. 168; *Norman v. Phillips*, 14 Mees. & Wels. 279; *Bushel v. Wheeler*, 8 Jurist, 532; 15 Adol. & Ell. N. S. 442, note.) In *Hodgson v. Le Bret* (1 Camp. 233) and *Anderson v. Scott*, cited in a note to the previous case, it was held that marking the name of the buyer upon the article in his presence, and with his consent, amounted to an acceptance within the statute; and this has been approved in subsequent cases. (*Boulter v. Arnott*, 1 C. & Mees. 333; *Byassee v. Reese*, 4 Met. [Ky.] 372; *Walden v. Murdock*, 23 Cal. 540.)

In the other cases upon which the appellant relies, in which there was a delivery, there was some feature distinguishing the case as one in which there was either nothing

The United States Reflector Co. v. Rushton.

to show that there had been any exercise of the right of approval, either before or after delivery, or an insufficient delivery, or some evidence of non-acceptance. In *Rodgers v. Phillips* (40 N. Y. 519), the delivery was to a general carrier, and not one designated by the buyer, which, though sufficient where there is a contract in writing, is not sufficient to make a valid contract under the Statute of Frauds; the coal in that case never having reached the defendant, but was lost by the sinking of the carrier's boat, which, as appeared by the evidence, was old and notoriously rotten.

In *Stone v. Browning* (51 N. Y. 211), the question litigated was whether the sale was by sample with a warranty, which was the only question submitted to the jury, and the judgment was reversed because the judge refused to submit the question to the jury, whether the defendant had ever accepted the goods, it being in evidence that the defendants took the cloth to their store, and after examining it, refused to accept it.

In *Silver v. Bowne* (55 N. Y. 659), the point was not considered, as no exception was taken, and the facts are not sufficiently reported to show under what circumstances the question was presented, except that it is inferable from the manuscript opinion of Andrew, J., which the appellant has submitted, that there had been no act of the defendant, either before or after the hay had been delivered to the carrier designated by him, from which an acceptance could be inferred.

In *Brewster v. Taylor* (63 N. Y. 589), an alteration was to be made in the wagon the defendant agreed to buy, which had not been done when it was sent to him, and there was no evidence to show, nor any thing from which it could be inferred, that the defendant had accepted the wagon as it was.

If a man goes into a store and selects a particular article of household furniture at a certain price, which he agrees to pay when it is delivered, and the proof is that that particular article was delivered, it is, in the absence of evidence of any objection on his part, to be assumed that there was both a delivery and acceptance of the article within the meaning

Banks v. Carter.

of the statute, and that is substantially the present case. If the testimony from which this is inferred to have been the true state of facts is somewhat meagre and general, it does not, as I have said, lie with the defendant to complain, who was willing that it should be so, without inquiring more particularly as to the facts.

There is no ground for a reargument, and no reason, the application being opposed, why we should send the case to the Court of Appeals. It would not promote the ends of justice, as the question presented upon the facts, as they are inferable from the evidence, is neither new nor doubtful.

JOSEPH F. DALY, J., concurred.

Judgment affirmed.

CHARLES BANKS, Appellant, *against* WELLINGTON A.
CARTER, Respondent.

(Decided January 7th, 1878.)

Under a complaint for damages resulting to plaintiff from defendant's leaving cumbersome property on demised premises after expiration of term, alleging that plaintiff did not receive possession until after the 2d of June, and was deprived of the benefit and enjoyment of the premises until the 18th of June, an answer counter claiming damages for a wrongful entry on or about the 2d day of June, and a reply denying generally the allegations of the answer constituting the counter claim, the plaintiff may give evidence of a peaceable entry with the defendant's consent on the 9th of June, and such evidence is not inconsistent with the plaintiff's pleadings, and a submission of the question of fact as to such peaceable entry and consent to the jury is proper under the issues raised.

A reargument will not be granted except where some question decisive of the case and duly submitted by counsel has been overlooked by the court, or where the decision made is in conflict with an express statute or a controlling decision, to which the attention of the court was not called by counsel.

It seems, that the notice in writing given under 1 R. S. 745, §§ 7 and 8, to terminate a tenancy at will or by sufferance, cannot be served by leaving it at the tenant's place of business (not being his residence) while he is absent therefrom.

Vol. VII.—27

Banks v. Carter.

It seems, that a tenancy from month to month, which by special agreement can be terminated upon a notice of thirty days, is in the nature of a tenancy at will, and that the notice to terminate it must therefore be given in the manner prescribed by 1 R. S. 745, §§ 7 and 8.

It seems, that in tenancies from month to month the thirty days of notice does not run from the day of service, but the statute requires the service to be made thirty days before the expiration of a month of tenancy ; thus, notice served on the 25th of April would terminate the tenancy on the 26th of May, the latter day being the end of a month of tenancy, *i. e.*, the day when the monthly rent is payable.

APPEAL from a judgment of this court, entered upon a verdict in favor of the defendant, Carter, rendered at a trial at trial term before Judge ROBINSON and a jury, and from an order denying a motion for a new trial on the minutes.

The action was brought to recover arrears of rent, and for damages arising from the defendant's leaving cumbersome personal property on the premises after the expiration of notice to quit, whereby plaintiff was deprived of the interest on purchase money until the property could be removed and a purchaser put in possession, and for money expended by plaintiff in removing the personal property encumbering the premises.

The answer denied notice of the termination of the letting, and counter claimed damages for a wrongful entry by plaintiff and for injuring and removing defendant's property. The exceptions argued upon the appeal were to the judge's charge, and particularly to his refusal to leave to the jury questions of fact arising on the evidence as to whether or not the defendant had waived notice, and peaceably given up possession to plaintiff. The jury gave a verdict for the defendant for \$500.

Anderson and Man, for appellant.

George P. Avery, for respondent.

CHARLES P. DALY, Chief Justice.—The tenancy was one of uncertain duration. It was, as the plaintiff's counsel conceded upon the trial, a tenancy from month to month, which

the parties had agreed could be determined by the landlord upon a notice of thirty days. Being thus in the nature of a tenancy at will, the thirty days' notice had to be given in the mode prescribed by the Revised Statutes, 1 Rev. Stat. 745, §§ 7, 8,—that is, by delivering a notice in writing to the tenant or to a person of proper age residing on the premises, or if the tenant could not be found, and there was no person residing upon the premises, then by affixing the same on a conspicuous part of the premises, where it might be conveniently read. Even at the common law, if personal service of such a nature could not be effected, it had to be left with the wife or servant of the tenant at his usual place of residence, whether on the demised premises or elsewhere, and its contents explained. (*Jones v. Marsh*, 4 T. R. 464; *Taylor's Landlord and Tenant*, § 484, 5th ed.) The notice in this case was not properly served. A notice in writing was left at the defendant's place of business, which was not delivering the notice to the tenant as required by the statute. This was the case with the letter of the 12th of April, 1873. When the one of the 26th of May, 1873, was left, the defendant appears to have been present, but that notice was not sufficient to warrant the plaintiff's entry on the 9th of June, 1873, being a notice only of fourteen days.

The defendant admitted that he had received both letters. The actual receipt of the notice of the 12th of April by the defendant, though not delivered to him by the messenger personally, might perhaps have been sufficient if the time when he received it had appeared. If it had appeared that he had received it at any time before the 26th of April, the 26th of the month being the day when the monthly rent was payable, it might have been sufficient, for in tenancies from month to month, the thirty days does not run, as the plaintiff claimed, from the day of the service of the notice, but the statute means thirty days before the expiration of a month. Thus, notice served on the 25th of April would terminate the tenancy on the 26th of May thereafter, this being the end of the month, or the day when the monthly rent was payable. (*Anderson v. Prindle*, 23 Wend. 616

Banks v. Carter.

Botsford v. Darling, 47 N. Y. 666 ; *Burns v. Bryant*, 31 id. 453 ; *People v. Schackno*, 48 Barb. 551.) That he had actually received such a notice, however, could not be inferred, it not appearing when the letter of the 12th of April came to his knowledge.

If this were all there was in the case the judgment would have to be affirmed ; but I think there was a question of fact which the plaintiff was entitled to have submitted to the jury.

The defendant, as I have said, admitted that he had received both notices, as well that of the 12th of April as that of the 26th of May ; so that he not only had actual notice that the plaintiff wanted the possession in thirty days, but when the plaintiff, on the 26th of May, sent a further letter advising the defendant that he had already been notified on the 12th of April that the plaintiff wanted possession of the lots, and that he then, on the 26th of May, wanted them immediately, the defendant told the messenger who brought the last letter, that " the place was open to go into at any time the plaintiff wanted it ; " and the plaintiff testifies that the defendant said to him two days before the plaintiff entered, or on the 7th of June, the entry being on the 9th : " You can have them (the premises). I will get out and give you possession," and that the defendant gave him possession then and there, upon which the plaintiff sent for his coachman and put him in possession. This the defendant denied, and testified that he had no recollection of having told the plaintiff's messenger what the messenger swore to. This conflict involved a question of fact, which the jury alone could pass upon ; and if the fact were that the defendant told the plaintiff he might enter, the entry was not unlawful. The defendant, if he thought proper, might even waive the thirty days' notice ; but having admitted that he received the letter of the 12th of April his consent, under such circumstances, given after the thirty days had expired, was sufficient to show that the plaintiff's entry on the 9th of June was with the defendant's permission, and consequently lawful ; that he was, even before the 9th of June, lawfully

Banks v. Carter.

in possession with the defendant's consent. The plaintiff asked to have the question of fact submitted to the jury, whether the plaintiff entered forcibly or peaceably took possession, with the defendant's consent; which the court refused, holding, as matter of law, that the plaintiff was not justified in removing the defendant's goods; to which the plaintiff excepted. The plaintiff then requested the court to charge that if the tenant gives up peaceable possession the landlord has a right to remove such articles as he may find on the premises, which the court also refused, and the plaintiff excepted.

It is insisted that the plaintiff was not entitled, under his pleadings, to have any such question submitted to the jury, and that the ruling of the judge was therefore right. The complaint was for two causes of action. The first count was to recover \$148 88 for the rent of the premises from the 26th of March to the 27th of June, 1873, which was allowed to the plaintiff in the verdict. In the second count the plaintiff averred that on the 12th of April, 1873, he notified the defendant to surrender the possession of the premises in thirty days from that date, which the defendant refused to do, and that he did not recover the possession of them until after the 2d of June, 1873; that the defendant had stored an immense quantity of personal property upon the premises, in consequence of which the plaintiff could not put the purchaser in possession on the 2d of June; that he then, on the 2d of June, notified the defendant to remove the property, or that he, the plaintiff, would remove it, and hold him responsible for the damages; but that the defendant refused to remove it, which the plaintiff had to do; whereby he was deprived of the beneficial use and enjoyment of the premises until the 18th of June, and put to loss and expense to the amount of \$622 74.

The defendant by his answer denied that any notice had been served by the plaintiff, terminating the tenancy, and averred that the plaintiff, on or about the 2d of June, forcibly ejected the defendant to his damage \$3,000. To which the plaintiff replied by a general denial.

Banks v. Carter.

The evidence of a peaceable entry by the plaintiff on the 7th or 9th of June, with the defendant's consent, was not inconsistent with these pleadings. All that the complaint averred was that the plaintiff did not receive or recover the possession of the premises until after the 2d of June, which was the fact, the plaintiff's entry being on the 9th of June; and that he was deprived of the benefit and enjoyment of them until the 18th, in consequence of the large amount of property there which the defendant did not and the plaintiff had to remove. This is not inconsistent with a consent on the part of the defendant, on the 7th of June, that the plaintiff might take possession, and his taking possession in pursuance of that consent on the 9th of June. He claimed in his complaint that he had served notice on the 12th of April, setting up that he was entitled to possession in thirty days thereafter. In this he failed, but was not cut off by his pleading from showing that he did not eject the defendant, as the defendant set up in his answer, on the 2d of June, but entered with the defendant's consent on the 9th of June. In other words, in his complaint he averred that he did not recover possession until after the 2d of June; and in his reply denied the averment in the answer that he had unlawfully, with force, ejected the defendant on the 2d of June. It was entirely consistent with the complaint and the reply to show that he entered peaceably, with the defendant's consent, on the 9th of June, the day, in fact, when he did enter, and began to remove the defendant's property.

I think, therefore, that new trial will have to be granted.

VAN HOESEN, J., concurred.

Judgment reversed and new trial ordered.

A motion for reargument was afterwards made and denied. Upon the decision of that motion the following opinion was given.

CHARLES P. DALY, Chief Justice.—A reargument is

Banks v. Carter.

granted only where some question *decisive of the case* and duly submitted by counsel was overlooked, or where the decision is in conflict with an *express statute* or a *controlling decision*, to which attention was not called by counsel. (*Curley v. Tomlinson*, 5 Daly, 283.) Nothing of this kind appears in this application. It is, in fact, a motion to argue the case over again upon a point carefully considered and passed upon by the general term.

The question was fully considered, whether the plaintiff was entitled or not, *under the pleadings*, to have, under the evidence, the question submitted to the jury, whether the defendant had not voluntarily given up the possession, and so terminated the tenancy before the 9th of June, when the plaintiff removed the defendant's property, after previously notifying him to remove it. We referred, in the opinion of the court, especially to the defendant's point, that it was inconsistent with the pleadings to have any such question submitted to the jury, and we held that it was not at all inconsistent. It was not a question of entry by license, nor did it involve any such question as a casual or involuntary trespass, where single damages only and not treble are recoverable (2 R. S. 338, §§ 2, 3, 4), which is what I suppose the defendant's counsel refers to. It was a question whether there was any trespass at all; which there certainly was not, if the plaintiff on the 9th of June was in possession, the defendant having previously consented that the tenancy should terminate, and the plaintiff take possession. The defendant assumes that we overlooked the date (the 26th of May) of the statement made by the defendant to the plaintiff's messenger, although, in the opinion of the court, the date is expressly stated. The counsel calls our attention to the averment in the complaint that the defendant remained in possession until the 2d of June; and he himself has overlooked the fact, or has not referred to it; that the plaintiff swears that after this, that is, on the 7th of June, the defendant told him he could have the premises, which was a consenting on his part that the tenancy should terminate, as the plaintiff had requested, and made the subsequent taking of pos-

Carpenter v. Nickerson.

session by the landlord lawful. What the plaintiff really wants is to argue the case over again ; as he has not called our attention to any thing which has not been fully considered and passed upon the application should be denied.

JOSEPH F. DALY and VAN HOESEN, JJ., concurred.

Motion denied with costs.

ELIJAH W. CARPENTER, Respondent, *against* CALEB NICKERSON, Appellant.

(Decided January 7th, 1878.)

Where the defendant having sold goods for plaintiff's account sent him an account of the sales, and the plaintiff called several times at the defendant's place of business for the purpose of getting further explanations in regard to it without seeing the defendant, and afterwards, on seeing the defendant, was paid something on account and promised a more detailed statement of the sales, showing the names of the persons to whom they had been sold, etc., and the plaintiff waited a long time for such further statement, and wrote for it, but it was not sent:—*Held*, that the first account sales furnished to the plaintiff by the defendant had not, by the action of the parties in regard to it, been made an account stated

APPEAL by the defendant from an interlocutory order made at special term by Judge LARREMORE, directing an accounting by the defendant of the proceeds of certain goods sold by the defendant for the account of the plaintiff.

The question litigated was, whether there had been an account stated between the plaintiff and the defendant.

The evidence which it was claimed by the defendant showed an account stated is set forth in the opinion.

H. M. Whitehead, for appellant.

E. D. McCarthy, for respondent.

Carpenter v. Nickerson.

CHARLES P. DALY, Chief Justice.—This case rested upon the testimony of the plaintiff and defendant, which was, to a large extent, conflicting, for all that the defendant's clerk swore to in respect to the account was, that he made out the account marked Exhibit No. 2, and delivered it, as he thought, to the plaintiff, but was not positive, and that he had no recollection that he saw the plaintiff afterwards.

So far as the plaintiff and the defendant are in conflict, their respective credibility was for the consideration of the judge who tried the cause; and as he saw the two witnesses and heard them testify, he was more competent to determine which of the two was to be believed than we could possibly be, having merely the transcript of the evidence before us. As he rendered a judgment for an accounting, we must infer that he believed the testimony of the plaintiff, and his testimony plainly shows that there never was an account stated; which would be conclusive upon the plaintiff. An account stated exists where an account is rendered, examined and accepted by both parties, and this acceptance may be implied from circumstances. If the party receiving it keeps it by him and makes no objection within a reasonable time, his silence will be considered as an acquiescence in its correctness, and he will be bound by it as a stated account (*Lockwood v. Thorne*, 11 N. Y. 173, 174, and cases there cited); but this was not such a case.

The plaintiff testifies that he applied for an account on the last of August, 1875, and the book-keeper promised to make it out, the plaintiff saying he would call in a day or two for it; that he kept going there every two or three days for more than a month, and was put off with excuses; that he finally told the book-keeper to send it to him; and that early in October he received the account, marked Exhibit No. 1, and dated October 4th, 1875. That he called two or three times but did not see the defendant until the 11th of October, when the defendant paid him \$2,900, on account, telling him that there were \$600 not yet collected. That the plaintiff then told him he wanted the account of sales, with the dates of sales and the names of the persons to

Carpenter v. Nickerson.

whom the defendant had sold the fish, there being no dates nor names in the account he had received; and he says the defendant promised that he would make out a bill to that effect, and that he, the plaintiff, told him that he would call for it; that he did so a number of times; but that the defendant never had time to make it out; and that finally he told the plaintiff when he did make it out to send it to him, and that some time in the following November he received the account marked Exhibit No. 2, which was not in accordance with his request; for although the dates of the sales are given in that account, the names of those who bought the fish are not. That he did not see the defendant, as he, the plaintiff, was taken sick, and did not go out after that; but that during the winter wrote to the defendant two or three times; the substance of the letters being, that he wanted to see the defendant in reference to the settlement of the account. That to these letters he got no answer, but in reply to a letter sent in the following May the defendant called, when the plaintiff told him that he wanted to see him in relation to the mackerel, because he saw that the account of sales did not agree with what the defendant had told him he had sold the mackerel for; that he wanted an explanation respecting this discrepancy, and also in relation to the storage and the cartage, to both of which he made specific objections, which I need not here enumerate. That the defendant admitted that there might be some mistake in respect to the storage; that he would go home and ascertain, and would then come back and explain on the next Saturday; after which, a conversation occurred in respect to the defendant taking notes from one of the purchasers, giving him an extension of time, an act which the plaintiff repudiated as having been done without his authority, and the defendant, he says, took the notes back with him, saying he could collect 75 cents on them. The plaintiff swore that he told the defendant then that the account was not satisfactory, and that the defendant promised to come over on the next Saturday and make every thing satisfactory to him, but that he never came to see him again; and that he never presented any other account.

Carpenter v. Nickerson.

It is very plain upon this testimony, which we must infer the judge below believed, that the plaintiff never acquiesced in the correctness of the account; that what he requested after the receipt of the first account had never been complied with, and that nothing had been done by him from which the law would imply that acquiescence, which constitutes and is essential to an account stated. The plaintiff had never had, according to his own testimony, such an account of the sales made of his property as he was entitled to, and the judgment directing an accounting, therefore, ought to be sustained.

The letters to which the appellant refers do not, as he claims, contradict the plaintiff's statement, and are not necessarily inconsistent with the account which he gives of what occurred.

In respect to the receipt of the \$2,900, the plaintiff says: "I got what I could from him," which may very well have been his feeling, after having applied so many times for the account of the sales, without obtaining it.

The appellant also claims that the account rendered was correct; which, however, we cannot infer when the plaintiff testifies that the defendant had told him that he had sold portions of the fish for a higher price than appears in the account; and that the defendant himself conceded that there might be errors in respect to the storage and the cartage. There is also the conflict in respect to the defendant's taking notes for a sale amounting to \$628.

None of the objections to the findings are well taken. If the judge believed, as we must assume, the plaintiff's testimony, he would not have been warranted in finding that the account rendered was true and correct; nor that the plaintiff received all the information from the book-keeper and the defendant that he requested. On the contrary, the plaintiff's testimony shows that such was not the fact.

The 10th request to find was immaterial. The defendant's statement that the account was such as is usually rendered by persons doing a commission business in New York, would not conclude the plaintiff in respect to an account

Whita v. Meyer.

in which, as a matter of fact, there were certain specific errors, as he supposed, in respect to which he required explanation, and which the defendant himself partially conceded.

The judgment for an accounting should, therefore, be affirmed.

VAN HOESEN, J., concurred.

Judgment affirmed.

ROBERT WHITE, Respondent, *against* HENRY J. MEYER,
Appellant.

(Decided January 7th, 1878.)

When the defendant, having been requested to become surety on a lease, stated to the plaintiff's agent that he wanted a clause inserted in the agreement of suretyship, providing that he should have fifteen days' notice of non-payment, to which the agent agreed, and the defendant afterwards instructed his book-keeper to insert a clause providing that he should have notice within fifteen days after non-payment, and the book-keeper thereupon inserted a clause requiring "fifteen days' notice of non-payment, or proof of demand being made," and the defendant, without noticing that the clause was not drawn according to his instructions to his book-keeper, delivered the agreement, and the plaintiff thereupon put the tenant in possession of the premises, neither he nor his agent having any knowledge of what had passed between the defendant and his book-keeper:—*Held*, that there was no mutual mistake of fact which would warrant the reformation of the instrument, so as to make it require notice to the defendant within fifteen days after non-payment of the rent.

APPEAL by the defendant from a judgment of the Marine Court of the city of New York, entered upon a decision of the general term of that court, affirming a judgment of that court entered on the verdict of a jury directed at trial term.

The action was brought against the defendant as surety on a lease made by the plaintiff to one Cochrane, to recover

White v. Meyer.

the rent due for December, 1875, and January, 1876. The defendant showed that no notice of Cochrane's default in payment of the rent had been given him until February 19th, 1876. The body of the agreement on which the defendant was sought to be held liable was as follows :

"In consideration of the letting of the premises above described, and for the sum of one dollar, I hereby become surety for the punctual payment of the rent and performance of the covenant of the above written agreement mentioned, to be paid and performed by John S. Cochrane; and if any default shall be made therein, I hereby promise and agree to pay unto Robert White, such sum or sums of money as will be sufficient to make up such deficiency, and fully satisfy the conditions of said agreement, requiring fifteen days' notice of non-payment, or proof of demand being made."

The defendant sought to show on the trial that it had been agreed between him and Roone, the plaintiff's agent, who had charge of the leasing, that it was agreed between them that the clause in the agreement as to notice should be for notice of non-payment of the rent within fifteen days thereafter, and sought to have the agreement reformed to express that. The evidence introduced for this purpose is stated in the opinion of Chief Justice DALY.

B. F. Watson, for appellant.

Jeroloman & Arrowsmith, for respondent.

LARREMORE, J.—As between the parties to this action no such mutual mistake was shown as would have authorized a court of equity to reform the contract. The mistake, if there were one, rested with the defendant and his own book-keeper. There was no attempt on the part of the plaintiff to mislead or deceive the defendant. The contract in question was left with him for examination and execution. He directed his book-keeper to make an alteration in it. That the latter was chargeable with an omission in the performance

White v. Meyer.

of his duty in nowise affects the rights of a third party without knowledge of such fact. (*Goodrich v. Thompson*, 44 N. Y. 324; *Tucker v. Woolsey*, 6 Lans. 482; *Ripley v. Cochran*, 10 Abb. Pr. N.S. 52; *Whitlock v. Schuyler*, 44 Barb. 469.)

The defendant did not specify the questions of fact which he desired to submit, and his exception upon this point must be overruled. (*Winchell v. Hicks*, 18 N. Y. 558; *Barner v. Perine*, 12 id. 18; *Graser v. Stillwagen*, 25 id. 315; *O'Neil v. James*, 43 id. 84.)

The judgment should be affirmed.

ROBINSON, J., concurred.

CHARLES P. DALY, Chief Justice.—In connection with what Judge Larremore has said, I have but to add that after the lease was returned to the plaintiff with the clause “requiring fifteen days’ notice of non-payment” inserted by the defendant’s book-keeper, the plaintiff had a right to assume, no matter what may have been said before between him and the defendant, that that was what the defendant wanted, and it would be most unjust afterwards to allow the contract to be defeated by inserting *within* fifteen days after non-payment, when the plaintiff may not have given the notice within that time, under the belief that all that was required was that he should give the surety fifteen days’ notice of the demand.

The foregoing opinion was delivered June 4th, 1877, and on a motion for a reargument the following opinion was filed, January 7th, 1878.

CHARLES P. DALY, Chief Justice.—To bring himself within the rule adopted in *Curley v. Tomlinson* (5 Daly, 283) and *Mount v. Mitchell* (32 N. Y. 702), the defendant’s counsel claims that we have, by a misapprehension of the facts, overlooked a question decisive of the case. Before the opinions were written, in which the defendant’s counsel, as he supposes, discovers this misapprehension, the evidence was carefully read. It has also been carefully reread upon this motion,

and the misapprehension of the facts has been on the part of the counsel, and not of the court. Neither Cochrane nor Roone testifies that Cochrane told Roone, the plaintiff's agent, that the defendant required a condition to be inserted that notice should be given to him *within* fifteen days after non-payment. The guaranty, as submitted to the defendant by Cochrane, contained these words: "Without requiring any notice of non-payment," and as so drawn, the defendant signed it. Cochrane testifies that the defendant said, he "wanted due notice if Cochrane did not pay the rent, but whether it was two weeks or fifteen days he could not recollect;" that he then went to Roone and told him, and bringing the instrument back to the defendant, told him that Roone was perfectly satisfied to make it fifteen days or two weeks. In a previous part of his testimony, he says that after he took the lease to the defendant the defendant said: "This must be altered. I must have fifteen days or two weeks' notice," and that he told the defendant that "he could make the alteration, and make it fifteen days or two weeks." The defendant left his book-keeper to make the alteration he desired, and the book-keeper altered the instrument by erasing the word "without," and by erasing the word "any," and interlining over it the words "fifteen days," so that it read, "requiring fifteen days' notice of non-payment." Cochrane, after expressing his belief that the defendant's book-keeper made the alteration in the instrument in the form in which it now is, says: "After, I went back to Meyer's office, and stated to him that Mr. Roone had no objection to *that*. I suppose I took the lease to my office, and when Mr. Roone called I gave it to him." The word "*that*" plainly refers to what was in the instrument, a condition requiring fifteen days' notice of non-payment; but the defendant's counsel puts his own interpretation upon the words, "Roone had no objection to *that*," which, he says, means the alteration which the defendant proposed, *within* fifteen days after non-payment of rent. We say it means the condition inserted in the instrument, of fifteen days' notice of non-payment, which is what Cochrane, from his testimony, understood to be what

White v. Meyer.

the defendant required, and I may add, which must also have been the understanding at the time of the defendant's book-keeper when he made the alteration; and there is nothing in any part of Cochrane's testimony respecting *within* fifteen days from non-payment. Roone, the plaintiff's agent, testifies that when the instrument was brought back to him by Cochrane it was in the condition in which it is now; so that Judge Larremore was correct upon the evidence in saying, that if the book-keeper "was chargeable with an omission in the performance of his duty, it in no wise affects a third party without knowledge of such fact." And the counsel for the defendant has no foundation for his very positive assertion, that "the case nowhere presents a third party without knowledge,"—that "there is not a particle of evidence to that effect." The whole of the evidence is to that effect. It is, that all that was communicated to the plaintiff's agent was, that the defendant required fifteen days' notice of non-payment; and that when the instrument was delivered to him for his principal it contained a clause to that effect.

That it was the defendant's intention that the clause should be *within* fifteen days after non-payment, rests solely upon the testimony of the defendant and his book-keeper. They respectively testify that that was what the defendant said, and the defendant swears he said that to Cochrane; but it was not what Cochrane said to Roone, and it matters not how the fact may have been as to what passed between the defendant, his book-keeper and Cochrane, for neither the plaintiff nor his agent are chargeable with a knowledge of that. The agent was told by Cochrane that the defendant wanted two weeks or fifteen days' notice if Cochrane did not pay the rent; and when the instrument was brought to Roone altered from the form in which it was, both he and his principal had a right to assume that that was what the defendant wanted, and it would be most unjust to deprive the plaintiff of his remedy against the surety, without whose guaranty he would not have let the premises, because he, the plaintiff, did not comply with a condition which was not in

White v. Meyer.

the instrument when it was returned to him, and of which he knew nothing.

It is sufficient to rest our decision upon this ground, and hold that the defendant was not entitled to the instruction he asked, that the jury, upon the uncontradicted evidence, should find for the defendant, because the instrument had been altered in a material respect without the defendant's consent. On the contrary, the plaintiff, upon the uncontradicted evidence, was entitled to a verdict, having let the premises upon the written guaranty which was delivered to him; and if it did not contain what the defendant meant it should it was through his omission and neglect, the consequence of which should not be visited upon the plaintiff.

The defendant, upon his own showing, signed the instrument first, and then left it to his book-keeper to see—I use his own language: “if there was a certain time in it—fifteen days.” He says that he told Cochrane that “he wanted fifteen days’ notice,” and that it was then delivered to Cochrane. Again, he says that he told his book-keeper to put in “fifteen days’ notice after the rent was due,” which is very different from *within* fifteen days after the non-payment of rent, which is what the defendant says he told Cochrane, and which the book-keeper swears was what he was instructed by the defendant to do; but which, it appears from the instrument, he did not do. When the book-keeper’s attention was called upon his cross-examination to the alteration in his own handwriting, he said that he did not know that this alteration was made until he saw the instrument when he was upon the witness stand; that he saw it a month after it was signed at the defendant’s office, and did not notice then but what he had *worded* it according to the defendant’s direction. He further testifies, that he made the alteration in Cochrane’s presence, and then handed the instrument to Cochrane. That the defendant did not direct him to make the alteration as it appears in the paper; that he had already stated what the defendant did direct him to make; so that we have this witness distinctly remembering, long afterwards, on the trial, what the defendant did direct him to do, and when confronted

The People v. Callahan.

by his own handwriting unable to explain why he did not make the alteration as directed ; in fact, swearing that when he saw the instrument afterwards he did not know that it was worded as it was. The whole of his testimony and that of the defendant, with the discrepancies in their respective statements, which I will not pause to point out, is a good illustration of the healthy rule which will not allow a written instrument to be varied or altered by oral testimony.

There has been no misapprehension of the facts by the court ; and the statement submitted to show it may be said rather to be devoted to convincing us that we have misapprehended the law. We are thoroughly satisfied that the case was correctly decided ; that there was no misapprehension of the facts or of the law, and the motion for reargument should be denied.

JOSEPH F. DALY, J., concurred.

Reargument denied.

THE PEOPLE OF THE STATE OF NEW YORK, *on the relation of* JESSE B. COLES, *against* JOHN CALLAHAN, Justice of the First District Court of the City of New York.

[SPECIAL TERM.]

(Decided January 9th, 1878.)

A writ of mandamus will not be granted to compel a justice of a District Court in the city of New York to insert in a judgment already rendered by him a statement that the defendant against whom it is rendered is subject to arrest and imprisonment, since the entry of the judgment required by the facts of the case is a judicial and not a ministerial act, and the remedy for a failure of the justice to enter the proper judgment is by appeal, and since also the justice after having entered the judgment is *functus officio*, and a subsequent entry on his docket to the effect that the defendant was subject to arrest and imprisonment would be void.

The People v. Callahan.

APPLICATION for a mandamus to John Callahan, the justice of the First Judicial District Court, in the city of New York, to compel him to enter in his judgment in the case of *Jesse B. Coles v. John Hannegan* the statement that the defendant, Hannegan, was subject to arrest and imprisonment.

The facts are stated in the opinion.

Jeroloman & Arrowsmith, for motion.

Hall & Blandy, opposed.

JOSEPH F. DALY, J.—Coles sued Hannegan in the District Court upon a claim for goods sold and delivered. The action was commenced by a warrant of arrest upon the ground that the debt was fraudulently contracted. The defendant was arrested and brought into court; no motion was made to discharge the warrant; issue was joined as to the debt and judgment rendered in favor of the plaintiff for \$180, the amount of the claim, and \$17 50 costs; the plaintiff asked the justice to state in the judgment and enter in the docket that the judgment was one wherein the defendant was subject to arrest and imprisonment, which the justice refused to do, and the plaintiff excepted. The plaintiff now applies for a mandamus to the justice to compel him to make the statement requested, and which is required by the statute in order to authorize an execution against the person in a case where an order or warrant of arrest has been issued and is not vacated.

I am not required here to decide whether the justice decided correctly in refusing to make his judgment as requested by plaintiff; for the reason that this is not the tribunal to review the ruling of the officer. The statement by a justice that the defendant is subject to arrest is part of his judgment; he must pass upon that question with the other questions in the case and render judgment accordingly. His act is a judicial and not a ministerial one in deciding and stating as the statute requires. (*Carpentier v. Willett*, 31 N. Y. 90; reported more fully in 28 How. Pr. 225.) If the jus-

The Mayor, &c. v. Ryan.

tice decides that the defendant is subject to arrest his decision is the subject of review upon appeal. (*Ib.*) Conversely, if he pass upon the question and decide the other way the plaintiff may appeal. This court cannot order a judgment one way or the other by mandamus. Besides, after rendering his judgment the justice is *functus officio*, and a subsequent decision and entry on his docket that the defendant is subject to arrest would be void. (*Carpentier v. Willett, supra.*)

Application denied with costs.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY
OF NEW YORK, Appellant, *against* MICHAEL RYAN, im-
pleaded with AUGUST SIBBERNS, Respondent.

(Decided February 4th, 1878.)

In an action against the sureties on the official bond of a marshal of the city of New York, where the alleged breach of the bond is misconduct of the marshal, in levying upon the goods of one person under an execution against another, the judgment in an action by the party whose goods were taken against the marshal for the unlawful taking may be given in evidence, although the record does not show that the judgment was recovered against him as a marshal, or for misconduct in his office. Such evidence is material to prove the act of taking, and parol evidence *dehors* the record may be given to show the grounds of the judgment, and that the act was done *colore officii*.

APPEAL from a judgment in favor of defendant.

The facts are stated in the opinion.

ROBINSON, J.—The decision of the Court of Appeals on the former appeal taken in this action to that court from a judgment of this court that had been affirmed at general term, and whereby the judgment rendered in favor of the defendant in this court was reversed, is conclusive upon

The Mayor, &c. v. Ryan.

plaintiff's right of recovery upon the facts alleged and proved.

The very point now taken, that the surety upon the official bond of a city constable was not liable for his official misconduct upon a judgment rendered against him for the unlawful detention of personal property, under color of official duty, where he was not sued by name or by allegation of his having acted in such official capacity, was specifically taken on the former trial, but does not appear to have been so addressed to the attention of the court, at general term or in the Court of Appeals, as to have called for any expression of opinion on either occasion. The defendant's points, however, presented this omission as one debarring any right of recovery, and notwithstanding it was so urged the Court of Appeals granted a new trial.

This brings the case fairly within the principle decided by the Court of Appeals in the case of *Buell v. The Trustees of Lockport* (8 N. Y. 55). In which the court say (what is applicable to the present case): "The decision of the Court of Appeals on the former appeal in this case disposes of it. The right of plaintiff to recover, on proving the facts stated in their declaration, was directly involved, and must be deemed established by the reversal of the judgment of non suit, and the award of a new trial. Unless some ground of defense was disclosed by the defendant on the last trial which was not brought to the notice of the court upon the former appeal, the judgment of the court below should be affirmed." The only qualification now to be noted is as to the last sentence, where the court below had recognized the principle stated; but in this case it was at trial overlooked or disregarded, and the principle decided requires a reversal.

But in addition to this, the case presented fully showed that the judgment against Sibberns was for official misconduct by him as constable, in levying under an execution issued to him against the property of one person upon that of the person aggrieved, and for which the action was brought and judgment recovered. Objection was taken on the trial by the defendant, Ryan, the surety upon the official

The Mayor, &c. v. Ryan.

bond in suit, to the introduction of the judgment record in the action brought by Redman against Sibberns, the constable, for the unlawful taking and detaining of whose property by him by virtue of an execution against other persons. The recovery was had, because, as claimed, it failed to prove a recovery against such constable for any default or misconduct in office. The objection was sustained and plaintiff excepted.

The exception was well taken. The fact of a recovery for an unlawful act was material, and defendant's liability as surety upon the official bond of the officer for unlawfully taking, under an execution, the property of a third person, is well established by the decisions of our courts. (*The People ex rel. Kellogg v. Schuyler*, 4 Coms. 172; *Pond v. Leman*, 43 Barb. 155; *Rogers v. Weir*, 34 N. Y. 465.) The judgment need not necessarily disclose the assumed authority of the officer. Such an allegation against one acting under *color of office* would be out of place in a complaint for trespass or for the recovery of personal property. The pretense for the unlawful act might be unknown, and it would be perhaps imprudent and a surrender of some right in such a pleading to assert or acknowledge the defendant's official character. It is for the fact that the officer so assumed to act, and not simply for or because of any judgment, that his surety is responsible. The law of 1813 (1 R. L. 219, sec. 5; 2 ib. 398) superadds to the necessary proof, in an action on the bond, that the wrongful act was done *colore officii*; that a judgment should be first recovered therefor against the officer, in order to give effect to the right to bring an action against the sureties. The fact that he so assumed to act, is one in such an action which may be established *de hors* that record. As the Court of Appeals say in *White v. Madison* (25 N. Y. 130): "It is always competent to show by parol the grounds on which a verdict or judgment was rendered when the grounds become material and do not appear on the record."

A new trial should be ordered, with costs to plaintiff to abide the event.

Bleecker v. The Mayor, &c., of the City of New York.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

New trial ordered, with costs to plaintiff to abide the event.

ANTHONY J. BLEECKER, Appellant, *against* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

(Decided February 4th, 1878.)

The Board of Commissioners of the Sinking Fund of the city of New York having passed a resolution employing the plaintiff to make an appraisal of property belonging to the city and county of New York, and by the same resolution having required the comptroller of the city of New York to make satisfactory arrangements with him as to his fees, and the plaintiff having arranged with the comptroller to leave the amount of his compensation to him upon the comptroller's promise that it should be liberal and satisfactory, and the comptroller never afterwards having fixed the amount :—*Held*, that the plaintiff was entitled only to such sum as the jury should find was a reasonable compensation for the services performed by the plaintiff.

Held, further, that after the services had been performed, a resolution of the board fixing the plaintiff's compensation at a certain sum did not, in the absence of the plaintiff's having acted upon the resolution by consenting to accept in payment for his services the sum so fixed, form a contract between the plaintiff and the board, and that the board having afterwards rescinded the resolution, it gave the plaintiff no right to recover that amount in an action against the city of New York.

It seems, that the Board of Commissioners of the Sinking Fund of the city of New York have no power to have made, at the expense of the city of New York, an appraisal of county property, or of property the management of which is not within the scope of, or has no relation to, the powers and duties of that board.

APPEAL by the defendant from a judgment of this court in favor of the plaintiff, entered upon a verdict rendered at trial term, and from an order denying a motion for a new trial.

The facts sufficiently appear in the opinions.

Bleecker v. The Mayor, &c., of the City of New York.

ROBINSON, J.—This action was brought by plaintiff against the defendants to recover from them the sum of \$15,000 and interest for services rendered by him for defendants in May, June and July, 1871, as an appraiser of real estate belonging to the city and county of New York. He was so employed by virtue of a resolution of the commissioners of the sinking fund, passed May 1st, 1871, employing or retaining him, with Adrian Muller and Cortland Palmer, for that purpose, which also required that the comptroller first make satisfactory arrangements with them as to fees. The arrangement he made with plaintiff was, that it was left by plaintiff to him to fix the compensation, on his promise that it should be liberal and satisfactory.

The comptroller was then Richard B. Connolly. Plaintiff and his associates thereupon proceeded to make appraisements, not only of property belonging to the corporation, of proprietary right, and in its municipal capacity, but of almost every item of real estate, except perhaps the streets and avenues of the city which it held "*publici juris*," in trust for public use, and for public purposes, including such as was held for "public charity and corrections," \$13,538,000; "board of education," \$6,093,570; "public squares and parks," \$106,416 46; Croton aqueduct department, \$90,000,000, &c., the greatest part of which must have been acquired by public taxation, not for mere municipal, but for general governmental purposes, and was in no respect within the jurisdiction of the Board of Commissioners of the Sinking Fund.

The ordinances creating the sinking fund, quoted or mentioned in Valentine's Laws, N. Y., 727-8-9, have reference only to such property as *belonged to the city* (see also L. 1871, chap. 574). The resolution, so far as it related to *county* property, or to what was not within the scope of, or had relation to, their powers and duties, was *ultra vires*, so far as that board was concerned.

In the case of *Muller v. Mayor* (the plaintiff's associate) against the same defendants, brought to recover for similar services (reported in 63 N.Y., 355), the Court of Appeals say: "By the charter (L. 1870, ch. 137, sec. 115 [116], vol. 1, p. 359)

and laws of 1871 (ch. 574, sec. 9, vol. 2, p. 1247) the commissioners of the sinking fund *have power to sell or lease any city property* after public advertisement and appraisal under the direction of said board. By clear implication the appraisal, as well as the sale of city property, is under the direction of the commissioners of the sinking fund, who have full power to select the appraisers. This is included in the power to direct as to the valuation and appraisal. It was for the commissioners to determine when an appraisal was necessary, to enable them intelligently and properly to exercise their discretion and perform their duties in selling, or offering for sale, or in leasing the city property." * * *

"They had the right to assume, that as to all the property which the commissioners *had power to lease or sell*, the employment was for some purpose connected with a lease or sale, and so within the authority of the commissioners." It was, therefore, with perfect justice and propriety that Comptroller Andrew H. Green in his report, made part of plaintiff's case, stated to his associates in the Board of Commissioners that "the duties of the commissioners of the sinking fund are special in their character, restricted to the preservation and proper investment of the funds committed to their care and management. The commissioners intrusted with the management of these funds had, so far as I can see, no concern whatever with the greater part of the real estate belonging to the city and county included in this appraisalment." And upon the same subject the Court of Appeals, in *Muller v. The Mayor, &c.* (63 N.Y. p. 358), say, "the employment of the plaintiff and his associates was not *ultra vires*, and so far as they rendered services for which, within the apparent authority of the commissioners, they might have occasion, the plaintiff is entitled to recover." That court thus expressly indicates its views, that the authority of the commissioners to employ appraisers is limited to cases within their *apparent* authority; not one capriciously assumed, but such as is clearly indicated by the statutes recognizing their duties and confining their powers to particular subjects.

It is in view of these facts and considerations that the

Bleecker v. The Mayor, &c., of the City of New York.

effect of the resolution of the board, offered at the meeting of the 30th of October, 1871, and adopted (after a refusal to adopt the report of the comptroller) at a meeting held November 27, 1871, "That \$15,000 be allowed and paid Anthony J. Bleecker for his services in appraising the value of the real estate belonging to the city and county of New York," and which, at a subsequent meeting of the board on the 8th of April, 1872, was rescinded, requires consideration.

The action of the board in employing him, or agreeing to pay him for appraising property over which they had no jurisdiction, was clearly illegal, and the resolution upon which this claim is predicated, conferred no rights to the sum so voted to be allowed him. Nothing in the decision of the Court of Appeals warrants any such assumption, and the case of the plaintiff, as presented by his complaint, as predicated upon the resolution of the 27th of November, 1871, as an official recognition by the sinking fund commissioners of his services in appraising "the real estate belonging to the city and county of New York," was of no legal effect, nor was any proof offered by him of the value in general of such services, when confined to such real estate belonging to the city as the commissioners might lease or sell, of any avail, when so unconfined or made immediately applicable to an appraisement having specific reference thereto, or as to which any such discrimination could be made by either the court or jury upon the testimony as presented.

This appeal is brought upon the exceptions taken by the appellant on the trial, as well as upon a case and appeal from an order denying a new trial upon points presenting such exceptions. Having regard thereto, plaintiff moved to strike out from the evidence the resolution of April 8, 1872, read by defendant's counsel, and which rescinded that of November 27, 1871, that plaintiff be allowed \$15,000 for his services. This was denied and exception taken. The latter resolution having never been acceded to by plaintiff as a satisfactory adjustment of this claim, the commissioners, if

Bleecker v. The Mayor, &c., of the City of New York.

lawfully authorized to act, would have had an undoubted right to recall the offer, and the evidence was neither irrelevant nor immaterial to the issue. The resolution besides, for the reason stated, being illegal to such extent as it assumed to allow compensation for the valuation of other property than such as they might sell or lease (*People v. Flagg*, 17 N. Y. 584), the next request, that the court direct a verdict for \$15,000, on the ground that it was a completed contract, finds no warrant in law. The request of plaintiff's counsel, that the judge charge the jury in the words of the opinion in *Muller v. The Mayor, &c.* (62 N. Y. p. 358), from and including the words "the arrangement, &c.," down to and including the word "liberal" on the last line of that page, was, in my opinion, properly refused, as inconsistent with the subsequent language of the opinion. That statement is to be taken with its context, and is to be accepted as relating to the "ambiguity of the resolution," and as the court subsequently say (p. 360), that "the conclusion is one to be arrived at, not from the language alone, but from that, and all the circumstances proved, it was a question of fact for the jury, and not one of law for the court. It was not a question of interpretation, but of inference and of fact." The third request is of like character as those previously mentioned, and was properly denied. The proposition of the judge submitted to the jury, that if it was the intention of the parties that plaintiff's compensation should be submitted solely to the comptroller, as sole arbitrator, "then his word was to govern," finds full recognition in the opinion of the Court of Appeals, while his further charge, that if they found, to the contrary, that he was entitled to a fair and reasonable compensation, fairly submitted to the jury the facts upon which plaintiff's claim could be presented. A general, but in no respect special, exception was taken to these several propositions, and was unavailable. A verdict in favor of the plaintiff was rendered for \$4,018 50. The basis of the recovery is not stated, but as the defendants do not complain, it may be presumed it was for the sum of \$3,000, together with interest from July, 1871, when the appraisers made their report. I am unable

Bleecker v. The Mayor, &c., of the City of New York.

to discover any variance in the charge from the terms of the opinion of the Court of Appeals, or other error, and am for affirmance.

LARREMORE, J., concurred.

CHARLES P. DALY, Ch. J., concurred in the result, delivering the following opinion:—

CHARLES P. DALY, Chief Justice.—I concur in the result, without expressing any opinion upon the question of *ultra vires*. I agree that under the view entertained by the Court of Appeals in the parallel case of *Muller*, that the proper course was to leave it to the jury to say whether the circumstances, position and relation of the parties authorized the inference that it was the intention that the whole question of compensation was to be left to the comptroller; the plaintiff consenting to accept what the comptroller should determine to be a liberal or satisfactory compensation, and if the jury were of the opinion that it was not, that then the plaintiff was entitled to recover a fair and reasonable compensation for his services. That the determination of the compensation, under such an understanding, was not necessarily limited to the action of Richard B. Connolly, who then filled the office of comptroller; but meant the officer, the person having the official authority to act on behalf of the city after the services had been performed, and that the plaintiff so understood it, appears in the fact that after he had applied to Connolly to fix the amount, and Connolly neglected to do so, he applied to Mr. Green, Connolly's successor in the office, who promised to submit the matter to the board, and have the award made, telling the plaintiff to come before the board and be heard, which the plaintiff did four times, but was never called upon to be heard.

When the appraisers applied to Connolly, and they, at his request, put down on a piece of paper what one-eighth of one per cent. upon the appraisement would amount to, that officer said, that it would have to go before the board, and

Bleecker v. The Mayor, &c., of the City of New York.

they replied, "We don't want the board; you, as comptroller, can fix it." Upon which Connolly said, "You attend the meeting of the board."

The bill of the appraisers was afterwards received by the board, and was referred by it to Mr. Green, who was then comptroller, to examine and report. Afterwards, communications were received from the appraisers, by the board, placed on file; and on motion of the chamberlain, a resolution was offered, allowing \$15,000 to each of the appraisers, which resolution was also referred to the comptroller; and he afterwards made a report that \$3,000 be paid to each of them for their services, which report was not adopted; but on the motion of the mayor a resolution was passed, allowing the plaintiff \$15,000; which resolution, at a subsequent meeting of the board, was rescinded.

After the services had been performed, it was not in the power of the board to fix the amount of the plaintiff's compensation, without his consent. He was either entitled to have it fixed by the comptroller, or entitled to what his services were reasonably worth. I do not see that the action of the board, either in passing the resolution to pay him \$15,000, or afterwards in rescinding it, in any way affects the question. Even if they had the power to fix absolutely the amount that was to be paid to the plaintiff, without his consent, the same board would have the power to reconsider the amount allowed, and to reduce it, or reject it altogether, leaving the plaintiff to his legal remedy. (*The People v. Stocking*, 50 Barb. 573.) They probably rescinded the resolution previously adopted, upon the assumption that, as by the first resolution, appointing the appraisers, the comptroller was first to make a satisfactory arrangement with them as to their fees; and as they had performed the services upon his assurance that he would afterwards fix an amount to their entire satisfaction, that the disposition of that matter was with that officer, upon such an understanding, and not with the board. The plaintiff's own valuation of his services, as appeared upon the trial, was much higher than \$15,000—his testimony being that they were worth \$50,000—

Wiener v. Morange.

and there is nothing in the case to show that he consented that the board should fix his compensation at the amount which it did. The plaintiff having given the resolution of the board—allowing \$15,000—in evidence, the subsequent resolution was properly admitted; and the plaintiff was not entitled to have the jury instructed to give a verdict for \$15,000, upon the ground that it was a completed contract.

I therefore agree that the judgment should be affirmed.

Judgment affirmed.

HENRY WIENER, JR., Respondent, *against* HENRY H. MORANGE (Impleaded), Appellant.

(Decided February 4th, 1878.)

By the provisions of section 1316 of the (new) Code of Civil Procedure, an appeal from a final judgment does not bring up for review an intermediate order which has already been reviewed upon a separate appeal therefrom by the court or the term of the court to which the appeal from the final judgment is taken.

An intermediate order separately appealed from and affirmed by default, has "already been reviewed" within the meaning of section 1316 of the (new) Code of Civil Procedure.

APPEAL by the defendant, Morange, from a judgment of this court, entered upon an order made at special term by Judge ROBINSON, overruling a demurrer to the complaint.

The order was taken by default. The defendant had previously appealed from two intermediate orders, which had been affirmed by default. In his notice of appeal from the final judgment he specified the two orders as being also appealed from.

The other facts necessary to an understanding of the decision here are stated in the opinion.

Henry H. Morange, appellant in person.

Frederick Smyth, for respondent.

JOSEPH F. DALY, J.—The appellant's object in appealing from the final judgment is to bring up for review two intermediate orders affecting the judgment: one made by Judge ROBINSON on February 24th, 1877, being an order of reference to compute the amount due on the plaintiff's bond and mortgage; and the other made by Judge Larremore in March, 1877, denying defendant's motion to compel the plaintiff to receive the said defendant's answer. The defendant, Morange, had previously taken separate appeals from those orders, which appeals were regularly brought on for hearing at the general term of this court held in May, 1877, and the appellant not appearing, both of said orders were affirmed by default, and orders to that effect were duly entered.

The defendant is not entitled to have the orders so affirmed reviewed upon this appeal. By section 1316 of the Code, an appeal from a final judgment brings up for review only such intermediate orders as have not already been reviewed upon a separate appeal therefrom by the court or the term of the court to which the appeal from the final judgment is taken. Separate appeals were taken from the orders in question, and upon such appeals the orders, when they came up for review, were affirmed. It is true that this affirmance was by default, but this circumstance operates more strongly against the appellant, for affirmance by default is tantamount to affirmance by consent; and is fully as conclusive upon the appellant as if the orders of the general term were made upon a full hearing of the appeal. Such is the effect of a judgment by default, and no good ground of distinction in that respect exists between a judgment and an order, or the affirmance of a judgment and the affirmance of an order. (*Powers v. Witty*, 42 How. 352; *Brown v. Mayor*, 66 N. Y. 385, and cases cited.)

The reasoning in both cases is the same. The party disputing the order or appealing from it, has had his day in court, and if he choose to suffer default, should not be allowed to vex his adversary a second time with what is in effect the same appeal.

Josuez v. Conner.

For these reasons the judgment should be affirmed, with costs.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Judgment affirmed with costs.

CATHERINE JOSUEZ, Appellant, *against* WILLIAM C. CONNER,
AS LATE SHERIFF, &c., Respondent.

(Decided February 4th, 1878.)

Where the complaint, in an action against a sheriff for damages for a false return of "not found" to an execution against the person, alleged that the action in which the execution issued was one in which an execution against the person would lawfully issue, and that an order of arrest had been issued therein, which was met by a denial of any knowledge or information sufficient to form a belief as to whether the execution had any force or vitality in law,—*Held*, that the burden of proof was on the plaintiff to show the issuing of a valid execution against the person.

It seems that if in such a case the plaintiff were to allege only that the execution directed the sheriff to take the body, etc., the fact that the action was one in which such execution could not lawfully issue, or that no order of arrest had issued therein, would have been matter of defense to have been pleaded and proved by the defendant.

In such a case, if the action in which the execution against the body was issued was one in which such execution could not lawfully issue unless an order of arrest had been previously issued therein, the plaintiff must prove the issuing of such order.

A sheriff is under no obligation to execute a void process regular upon its face.

The best evidence of the fact that an order of arrest has issued in an action is the order itself.

Secondary evidence to establish that fact will not be allowed, unless it is sufficiently shown that the original order is lost or destroyed.

Where the evidence showed that when the order was last seen it was in the hands of a judge of the court from which it issued, that the judge had since died, that the plaintiff's attorney had searched, as he testified, "with great care" the files and indices of the clerk's office and had not found the order, that it should be there, and that he did not know where it was:—*Held*, that the loss or destruction of the order had not been sufficiently shown.

Josuez v. Conner.

APPEAL by the plaintiff from a judgment of this court, entered upon a dismissal of complaint by the court, at a trial before Judge LARREMORE and a jury, and also from an order refusing a new trial.

This action was brought against William C. Conner, as sheriff of the city and county of New York, to recover damages for a false return to an execution against the person of one Francis Everaet. The complaint alleged the recovery of a judgment in favor of Catherine Josuez against Francis Everaet in the Marine Court of the city of New York; the return of an execution against the property of Everaet; the issuing of the execution against his person; that the action in which it issued was one in which an execution against the person would lawfully issue; that an order of arrest therein had been granted, and the defendant Everaet thereunder had been arrested and held to bail; that during the entire time the sheriff held the execution against the person Everaet was within his county, and that the sheriff falsely returned the execution "not found."

The answer admitted receiving the execution against the person; denied that the defendant had any knowledge or information sufficient to form a belief as to whether the execution ever had any force or vitality in law; denied that Everaet was within his county, or that the execution was returned "not found," and alleged as a separate defense that Everaet was insolvent, and by collusion with the plaintiff kept himself concealed during the entire time the execution against his person was in the hands of the sheriff.

At the trial, plaintiff offered in evidence the judgment roll in the action in which the execution was issued. It contained several orders, one of them an order denying a motion to vacate two several orders of arrest granted in that action. These orders were excluded by the court, and the judgment roll admitted. Plaintiff excepted to the exclusion of the orders. Plaintiff put in evidence an undertaking upon application for an order of arrest, with indorsement of approval. The execution against the person, offered in evidence by the plaintiff, was admitted, subject to its being connected

Josuez v. Conner.

by legal proof of the granting of the order of arrest. The plaintiff's attorney, Mr. Wilder, then testified that he applied for the order of arrest to a justice of the Marine Court; that the justice granted it; that a marshal served it; that the defendant was arrested under it; and that the defendant, Everaet, moved to vacate it. He further testified that he did not know what had become of the order of arrest; that he had examined the files and books of indices in the clerk's office down to the present day with great care, and that it was not there; that the last time he saw it Judge Spaulding, a justice of the Marine Court, had it; that it was handed up to Judge Spaulding at the trial of another action brought by the same plaintiff against the marshal. Plaintiff separately offered in evidence the order denying the motion to vacate the order of arrest which was attached to the judgment roll, but this was excluded upon the objection that proper foundation for secondary evidence had not been laid, to which ruling plaintiff excepted. Plaintiff offered in evidence another order made in the action in the Marine Court, directing the marshal to execute the order of arrest, and to arrest the defendant, Everaet. This was excluded upon objection, and the plaintiff excepted. Francis Everaet then testified for the plaintiff that he had been arrested in the action in the Marine Court, and that he was in the county all the while the sheriff held the execution against his person, and did not conceal himself. The defendant introduced no evidence, and at the close of the plaintiff's case moved to dismiss the complaint. The court granted the motion, holding that plaintiff had not made out a *prima facie* case; and had not established the loss of the order sufficiently to admit of the introduction of secondary evidence. To this ruling the plaintiff excepted.

Edward P. Wilder, for appellant, cited, on the duty of the sheriff under the execution, 17 Wend. 483; 21 Wend. 40; 11 Hun, 253; 5 Hill, 440; 16 Wend. 519; 24 Wend. 487; 13 Johns. 529; 15 Johns. 155; 8 Cow. 194; 23 How. 126; 13 Wend. 40; 4 Bosw. 384; 9 N. Y. 210; 2 Edm. Stat. p. 459, § 77; 6 How. 75; 12 Wend. 97; 44 N. Y. 165; 5 Johns.

100; 9 N. Y. 210; 7 N. Y. 199. On secondary evidence, Starkie on Ev. 536; Greenleaf on Ev. § 558; Wharton on Ev. § 142; Id. § 147; 4 Wend. 543; 10 Barb. 376; 7 Peters, 99; 6 Binn, 59. On the exclusion of the orders attached to judgment roll, Old Code, § 281; 6 N. Y. 565; 14 How. 427.

Vanderpoel, Green & Cuming and *H. W. Bookstaver*, for respondent, cited, on dismissal of complaint, 28 How. Pr. 225; *Sawyer v. O'Brian*, Com. Pleas, not reported; 16 Wend. 562; 1 Hill, 118; 13 Wend. 68; 7 Hill, 35; 40 N. Y. 124; 19 Abb. 306; Hoff. Prov. Rem. 22, 23. On secondary evidence, 10 Johns. 363; 6 Cal. 460; 1 Abb. Pr. N. S. 121; 19 Johns. 193; Code Civil Procedure, § 961; 3 Johns. 300; 7 Cow. 334; 1 Carr & Payne, 282; 1 Ala. Rep. 71; 1 Hud. and Brooke Rep. 748, 749; 3 Hawks, 364; 12 Johns. 192; 16 Johns. 193; 3 Johns. 374; 4 Cow. 483; 5 Peters, 239-243; 4 Wend. 543. On the exclusion of the orders, 6 N. Y. 560; Code of Procedure, § 281.

CHARLES P. DALY, Chief Justice.—The main question discussed upon this appeal was, whether the plaintiff should have been allowed to prove the existence of an order of arrest by secondary evidence. The complaint averred that the action was such in its nature that an execution against the person of the judgment debtor could lawfully issue to enforce the judgment; and that an order of arrest against Everaet had been duly granted in the action; which the answer traversed by denying any knowledge or information sufficient to form a belief as to whether the said pretended execution had any force or vitality in law.

It was incumbent, therefore, upon the plaintiff, to maintain the action, to show that an order of arrest had been issued as averred in her complaint, which she failed to do. To do this, she was bound to produce the original order, or show that it could not be found after a diligent search for it.

The order was returnable to the Marine Court. It appears from Mr. Wilder's testimony that the last he saw of it was in the hands of Judge Spaulding, a judge of the court, who

Josuez v. Conner.

is now dead; that all the witness knew respecting it was, that he gave it to the marshal to serve, who is no longer a marshal; that he made diligent search for him, but could not find him; that a motion was made to vacate the order of arrest, in which motion it was handed up to Judge Spaulding, who looked at it; but what he did with it the witness could not say, further than that his impression was that the judge put it in his pocket. The proper place to look for it, the motion having been denied, was in the clerk's office of the court, and if not found there, some inquiry should have been made of the deceased judge's executors or other persons having his papers. Mr. Wilder testifies that he has examined the books and files of indices in the clerk's office of the Marine Court, down to the present time, with great care, but did not find it. It ought, he says, to be there, but it is not, and he does not know where it is. The judge below held that this was not due diligence to entitle the plaintiff to give secondary evidence of the contents of the order, and we cannot say that the judge erred in so holding.

The plaintiff claims that her motion for judgment on the pleadings should have been granted. The motion, in my judgment, was properly denied. The question was not whether the sheriff would have been protected if he had arrested the defendant upon the execution, the execution being regular upon its face. The action was brought against the sheriff for not returning it; and unless, as the plaintiff has averred, the action in which the judgment was rendered was such that an execution against the person could lawfully issue to enforce the judgment, or unless an order of arrest had been obtained, the execution was void, being unauthorized by law; and the plaintiff cannot maintain an action against the sheriff for failing to return an execution which the plaintiff had no right to issue. (*Carpentier v. Willett*, 28 How. Pr. 225; *Wood v. Henry*, 40 N. Y. 124.)

It is an ample defense to this action, to show that the plaintiff had not sustained, and could not sustain, any injury by the officer's failure to return such an execution, or by his returning that he could not find the defendant. It is no de-

JOSUEZ v. CONNER.

fense to an action for not returning an execution that it was irregular. If an execution is voidable for any defect or irregularity, it is no excuse for the officer, as that is a matter of which the party alone can take advantage. It is voidable whenever it is amendable, and it is not amendable if there was no authority whatever in the law to issue execution against the person. No execution can issue for the arrest of a person, except in the cases provided by law; and if issued upon a judgment in an action where the defendant is not, and could not be, subjected to arrest, it is not merely voidable, but void. Process which is void, although it may be regular on its face, the officer is under no obligation to execute, and he may, in an action brought against him for refusing to execute it, set up its invalidity. (*Cornell v. Barnes*, 7 Hill, 35; *Earl v. Camp*, 16 Wend. 567; *Parmalee v. Hitchcock*, 12 id. 97; *Bacon v. Cropsy*, 7 N. Y. [3 Seld.] 199; *Albee v. Ward*, 8 Mass. 79; *Dillingham v. Snow*, 5 id. 558; *Anon.*, 1 Ventr. 259; *Squib v. Hale*, 2 Mod. 29; S. C. 1 Freeman, 129.)

If the plaintiff had simply averred that the officer was commanded by the execution to arrest the person of the defendant, then it would have been incumbent upon the officer to show in his justification, and as a defense to the action, that the process was void. But the plaintiff saw fit to aver that it issued upon a judgment in an action in which the defendant was liable to arrest; and as the marshal traversed this averment the plaintiff had to prove it, it being a matter especially within his knowledge, as he brought the action. What was said by Justice Willard in *Hutchinson v. Brand* (9 N. Y. 210), upon which the appellant relies, so far as it implied that if the execution was issued in an action in which the defendant could not be arrested, the remedy was by motion to set aside the execution; and that the sheriff was bound to execute it, was merely *obiter*. The case before the court was simply one of irregularity. The words "or be discharged" had been omitted in the execution, which would not render it void, as it was amendable; and that it was defective in this respect, as I have already said, could be no defense to the sheriff, which was what was necessarily de-

Josuev v. Conner.

cided in the case, whatever Justice Willard may have said in his opinion respecting the law. His attention, obviously, was not drawn to the distinction that the sheriff is not bound to execute process which is void, although regular upon its face, and to the long list of authorities, even before the recent cases I have cited from the Court of Appeals, that have held that to be the law ; and a like misconception is apparent in the use of the word " void " in the marginal note in *Blin v. Bleakely* (23 How. Pr. 124), the other case relied upon by the appellant.

If the plaintiff had had an official search made by the clerk of the Marine Court, and the order could not be found in the clerk's office, I should have been disposed to regard that as a sufficient exercise of diligence, as it should have been returned to the clerk's office after the denial of a motion to discharge the arrest. The plaintiff's attorney's statement that he examined the files and books of indices in the clerk's office, with great care, amounts to little more than his opinion of the nature of his search. What acquaintance he had with the mode of keeping papers in the clerk's office is not shown ; nor what he really did, except the general statement that he examined the files and books of indices. When a paper that ought to be in a public office is not readily found, the proper course is to get the officer who is in charge of the office to search for it, and prove the search by him, or by the deputy who made it, or give in evidence the certificate of the clerk that he had made a diligent examination in his office and that it could not be found (2 R. S. 552, § 13), which is the course usually pursued in such cases. An official search by the clerk or his deputy, however, is not indispensable. It may be equally effectual when made by one not connected with the office, provided he has had an equal opportunity to ascertain the fact, and has done all that the official could have done. Thus, in *Jackson v. Russell* (4 Wend. 543), a search made in the surrogate's office for a will by a person not connected with the office, but which was made under the surrogate's direction, was deemed equivalent to a search by the surrogate himself ; and in *McGaley v. Alston* (2 M. & W.

Josuev v. Conner.

206), a search made for a cancelled check in the office where such checks were kept, by the examination of several bundles of cancelled checks handed to the person applying by the official in charge of the office, was held sufficient. *Winor v. Tillotson* (9 Peters, 99) was a like case. The missing deed had been in the possession of General Wade Hampton. The plaintiff's attorney applied to him for it, and the general gave the attorney a bundle of papers, saying it contained all the titles to a certain tract of land, a title to a part of which was claimed under the missing deed; and the deed, upon examination, not having been found by the attorney in the bundle, it was deemed a sufficient search. In *Kaufman v. Congregation, &c.* (9 Binn. 59), the search was made among the papers of the deceased person with whom the agreement had been left by the person with whom it had been deposited, which was held sufficient. In *The King v. Stourbridge* (8 B. & Cres. 96), the indenture had been sent to the overseers of the parish, and, if received, ought to have been put in a chest in which such indentures were kept; and a diligent search for it in the chest by an overseer of the parish was held to be enough. In *Teale v. Van Wyck* (10 Barb. 377), a search for a bond that ought to have been filed in the county clerk's office was made by the plaintiff's attorney *in the places in the office where such bonds were usually filed*, and could not be found. He did not testify that he made the search under the direction of the county clerk; but as no objection was made upon that ground in the court below, it was held that it could not be raised upon the appeal.

I have thus reviewed all the cases upon which the appellant relies, and no one of them would warrant us in deciding that the judge below erred in holding that the evidence given was not sufficient to show that such a diligent search had been made, as to create the presumption that the order of arrest was lost, or establish that it could not be found, so as to entitle the plaintiff to give secondary evidence of its contents. A simple mode existed of proving that the order could not be found in the clerk's office, by obtaining a certificate of that fact from the clerk (2 R. S. 552, § 13); and

Weil v. The Merchants' Despatch Transportation Co.

this being the case, it would be encouraging a very loose practice to allow as equally satisfactory the testimony of an attorney, that he has searched with great care, without any thing before us to warrant our assuming that he knew where and how to search for the order; or any evidence that he applied to the clerk, or any of the officials in the office, for information; or made his search under their supervision or direction.

The judgment should therefore be affirmed.

ROBINSON and JOSEPH F. DALY, JJ., concurred.

Judgment affirmed.

ABRAHAM WEIL *et al.* Respondents, *against* THE MERCHANTS' DESPATCH TRANSPORTATION COMPANY, Appellant.

(Decided February 4th, 1878.)

Where the defendant received goods for transportation and gave a receipt which stated that the goods were to be forwarded to the points to which a bill of lading should be given,—*Held*, that the defendant was not liable for a loss of the goods occurring after the defendant had transported them over its own line of carriage and delivered them to a carrier having a connecting line on the route towards the place named as the address of the consignee of the goods.

APPEAL from a judgment entered upon an order of the general term of the Marine Court of the city of New York, affirming a judgment entered upon a verdict for the plaintiffs, directed by that court at a trial before a judge thereof and a jury.

This action was brought to recover the value of a case of goods which the plaintiffs, Weil Brothers & Cahn, alleged in their complaint the defendant, a corporation, agreed to carry for them from New York City to San Francisco, California.

The defendant in its answer admitted that it received the

Weil v. The Merchants' Despatch Transportation Co.

case of goods addressed to the plaintiffs at San Francisco, denied the agreement, and alleged further that the termination of its route in the direction of San Francisco was Chicago, Illinois, and that the case of goods was forwarded by the defendant to Chicago and there delivered to the next connecting carrier for transportation to the place of destination.

On the trial it was proven that the case marked "W. C. & Co., San Francisco. P. F. F. C. R. I. & P. R. R.—1373—8560" was delivered to the defendant by the vendors, Garner & Co.; that Garner & Co. filled out and presented to the defendant for its signature a receipt which was signed by Geagen, the defendant's agent. The receipt which was put in evidence was in the following form:

New York, Nov. 21, 1873.

Received, in apparent good order, by MERCHANTS' DESPATCH TRANSPORTATION CO. of Garner & Co. the following packages, to be forwarded subject to the conditions contained in the Bills of Lading of this Company, to the points to which Bill of Lading shall be given.

Marks and Consignee's Name.

W. C. & Co.
 San Francisco.
 P. F. F.
 C. R. I. & P. R. R. Co.
 Weil Bros. & Cahn.
 "Merchants' Despatch."

Three (3) cases Domestic.

1681.—2102.

1373.—8560.

1595.—2000.

Geagen.

Moses Weil, one of the plaintiffs, testified to a conversation with the agent, Geagen, which was to the effect that the defendant would ship the goods to San Francisco at the usual tariff.

Peter F. White, a clerk of the defendant, testified that at

Weil v. The Merchants' Despatch Transportation Co.

the time of the shipment of the goods the terminus of the defendant's route in the direction of San Francisco was Englewood, Illinois, that a bill of lading on that route would be given to Englewood, that the case of goods in question was transported by the defendant to Englewood and there safely delivered to the Chicago, Rock Island and Pacific Railroad Company, the connecting carrier in the direction of San Francisco, and the same was duly received by them, and the freight charges of the defendant upon said case from New York to Englewood were then and there paid by said Railroad Company to the defendant.

Defendant moved the court to direct a verdict for the defendant. This motion was denied, and upon motion of plaintiffs, the court directed a verdict for the plaintiffs.

Hamilton Cole, for appellant.

When a carrier receives a package addressed to a point beyond his route, and makes no other contract than is implied from the receipt of a package so marked, his duties and liabilities are terminated when he has carried the package to the termination of his own route in the direction of its ultimate destination, and has there delivered it to a connecting carrier. This rule is well settled, and has never been questioned since the case of *St. John v. Van Santvoord* (6 Hill, 157); and see also *Mills v. Mich. Cent. R. R. Co.* (45 N. Y. 622); *McDonald v. West. R. R. Co.* (34 N. Y. 497); *Root v. Great West. R. R. Co.* (45 N. Y. 524); *Wright v. Barton* (22 Barbour, 562); *Pratt v. Grand Trunk R. R. Co.* (N. Y. Weekly Digest, vol. 5, page 265, No. 12); *Reed v. U. S. Express Co.* (48 N. Y. 462); *Dillon v. Erie R. R. Co.* (1 Hilton, 232); *Ackley v. Kellogg* (8 Cowen, 223); *Hempstead v. N. Y. Cent. R. R. Co.* (28 Barb. 486).

In this case the express contract proposed by the shipper and assented to by the company was, that the property in question should be carried subject to the conditions contained in the bill of lading of the defendants, to the point to which bill of lading would be given, and this point was proved to be Englewood.

Weil v. The Merchants' Despatch Transportation Co.

Lauterbach & Spingarn, for respondents, cited *Hill v. Syracuse R. R. Co.* (8 Hun, 296); *Bostwick v. Balt. & Ohio R. R. Co.* (45 N. Y. 712); *Berg v. Narragansett S. S. Co.* (5 Daly, 395); *Foy v. N. Y. & Boston R. R. Co.* (24 Barb. 382).

ROBINSON J.—The defendants, in November, 1873, were an incorporated transportation company, having a route from this city to Englewood, in the State of Illinois. On the 21st of that month they received in New York certain goods of the plaintiff's, for which they gave a receipt presented them by the shippers, specifying that they were to be forwarded by them "to the points to which bills of lading should be given." No bill of lading (so far as appears) was given. The defendant's receipt described the "marks and consignee's name" as follows: "W. C. & Co., San Francisco;" "P. F. F.;" "C. R. I.; & P. R. R. Co.;" "Weil Bros. & Cahn;" "Merchants' Despatch." Defendants proved that they safely transported and delivered the goods *en route* for San Francisco, at Englewood, to the Chicago, Rock Island and Pacific Railroad Company; and that the freight charges to that point were thereupon paid them by that company.

Upon such proofs a verdict was on the trial directed by the judge for plaintiffs, under exception by defendants.

The defendants were common carriers only to Englewood, and the entire obligation they assumed by the written agreement was expressly that of *forwarders*. Whatever might have been their obligation for breach of duty as common carriers for the portion of the route in respect to which they exercised the character of carriers, the agreement proven in express terms, comprehending only that of *forwarders*, could by no implication or deduction from its terms be held to have imposed upon them any other, beyond Englewood, than one of that character. I am unable, under the terms of this contract, to recognize any liability on their part for any loss or injury to the goods after such delivery thereof to the connecting line of transportation at Englewood.

Kinzey v. Kinzey.

The judgment should be reversed and a new trial ordered, with costs to appellants to abide the event

LARREMORE, J., concurred, and delivered the following opinion:—It was decided in this court in *Berg v. Narragansett Steamship Co.* (5 Daly, 395), that a carrier of goods is not liable for loss beyond his own route, unless by special agreement. In that case there were facts from which such an agreement might have been inferred. The entire route was expressed in the "way bill" and the through freight was charged.

Nothing of this kind is shown in the case at bar. No bill of lading was produced on the trial, and the copy of the address upon the delivery receipt was a matter of description and not an agreement. I therefore concur in reversing the judgment.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

WILLIAM KINZEY, Respondent, *against* ADELAIDE
KINZEY, Appellant.

(Decided February 4th, 1878.)

Alimony *pendente lite* will not be allowed unless the existence of the marital relation be proven to the satisfaction of the court.

In an action by a husband for an absolute divorce on the ground that at the time the marriage was contracted his wife had a husband then living and had fraudulently concealed that fact from him, the court refused to allow the wife alimony *pendente lite* where it appeared that she had had a husband prior to her marriage with the plaintiff, and had obtained a limited divorce from him on the ground of abandonment shortly prior to her marriage with the plaintiff; and although the wife swore that she had no knowledge of the whereabouts of her first husband, and had not heard of or from him for some nine years prior to her marriage with the plaintiff, yet the court held that the fact of her having obtained the divorce showed that she could not have believed her former husband to be dead,—which prevent-

Kinzey v. Kinzey.

ed her from taking advantage of the statute (2. R. S. 139 § 6), providing that "if any person whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the life of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent jurisdiction."

APPEAL from an order of this court made at special term by Judge JOSEPH F. DALY, denying a motion by defendant for alimony *pendente lite* and counsel fee.

The facts are stated in the opinion.

The opinion at special term was as follows :

" Although defendant positively swears that she had no knowledge of the whereabouts of her first husband, and had not heard of or from him for some nine years prior to her marriage with plaintiff, yet it appears from another circumstance stated in her affidavit that she could not have believed him to be dead. That circumstance is the institution by her of a suit for divorce from him at the time she contemplated her marriage with plaintiff, which divorce was, as she says she believes, finally procured for her just before such marriage; the decree however being sent to her after it had taken place.

" The statute which may be said to sanction a subsequent marriage by a person whose husband or wife has absented himself or herself for a space of five years expressly provides that the absentee must not be known to such person to be living during that time. (2 R. S. 139, sec. 6.) In such case only is a subsequent marriage valid until its invalidity is pronounced.

" *The full belief* in the death of the former husband or wife is the element of good faith required by the statute, in order to entitle the issue of a subsequent marriage to inherit from the parent who was entitled to contract that marriage. (2 R. S. 142, sec. 23.) And this element of good faith is of controlling importance in dealing with rights of the parties to the subsequent marriage as against each other; in this case both parties to this action certainly had reason to believe, if they were not in fact actually convinced, that the defendant's former husband was living when this marriage was

Kinzey v. Kinzey.

contracted; the defendant, because she instituted suit for divorce from him, and the plaintiff, because, as he himself swears, she informed him of her desire to obtain such divorce.

"That divorce was to be obtained for abandonment, and both parties were bound to know that it was mere separation and not a dissolution of the bond of the former marriage (2 R. S. 147, sec. 51), and they would seem therefore to have contracted this marriage with the knowledge that the former union was in force.

"No observations of mine can add to the force of the mere statement of the facts showing the full extent of the legal, moral and social wrong committed in this easy violation of sacred and lawful obligations, and no other reason need be given for refusing any allowances by alimony or otherwise to a party confessedly entering into this marriage in bad faith."

John W. Weed, for appellant.

H. Daily, Jr., for respondent.

LARREMORE J.—The plaintiff seeks in this action to annul the marriage between himself and the defendant on the ground of fraudulent representations, and on the ground that at the time of such marriage, and of the commencement of the suit, her former husband, Willard Ide, was alive. It appears by the motion papers that Ide abandoned the defendant in the year 1859, since which time she claims to have had no knowledge of his existence. Her answer sets up that she made a statement to the plaintiff of the fact of the continuous absence of her former husband, and that he—the plaintiff—entered into matrimony with her with full knowledge of all the facts affecting their marital relations. In his complaint, the plaintiff avers that since their separation he has paid and allowed defendant for her support the sum of \$20 per week, and that he is ready and willing, and therein offers, to continue the said payment and allowance during the pendency of the action. The defendant made a motion for alimony and allowance, which was denied, and she appeals.

Kinzey v. Kinzey.

The validity of defendant's second marriage rests upon the provision of the statute that if any person whose husband or wife shall have absented himself or herself for the space of five successive years without being known to be living during that time, shall marry, such marriage shall be void only when so declared by a court of competent jurisdiction.

The counsel for the appellant indulged in a criticism of the terms used by the learned judge in his decision of the motion. The judge holds, that "belief in the death" of her first husband was essential to the validity of her second marriage. The counsel argued that the "want of knowledge of her former husband being alive" was the statutory test of validity. Without entering into any extended discussion of the technical refinements and distinctions between a belief in a fact and a knowledge of that fact, it is obvious that the statutory phrase "being known," implies and includes not only the thing known but also that which *may be known*. The decision complained of is susceptible of the construction that if the defendant had a belief that could and would have ripened into a knowledge of her former husband's existence during the five years immediately preceding her second marriage, it was bad faith on her part to enter into that relation without employing some means to ascertain a fact so essential to its validity. The statute whose protection she invokes offers no premium for ignorance or want of ordinary precaution. The affidavit of Anson H. Brown shows that in the year 1874 said Ide lived with his father at Rahway, New Jersey, where defendant's daughter formerly resided, and where her mother visited her; and although this place was of convenient and easy access, yet no information is sought, nor inquiry made at the place and from the persons, where the knowledge, if desired, was most likely to be obtained. The whole transaction was certainly questionable.

In *Bartlett v. Bartlett* (Clarke Ch. 463), alimony was refused in a suit brought to annul a marriage, but *North v. North* (1 Barb. Ch. 241) is an authority for awarding it.

In *Reeves v. Reeves*, recently decided, this court, following the ruling in *Brinkley v. Brinkley* (50 N. Y. 184),

Zinsser v. Seiler.

held that alimony would not be allowed unless the existence of the marital relation be proven to the satisfaction of the court, for the right to alimony depends upon that relation.

Under the authority of that decision the order appealed from must be affirmed.

ROBINSON, J., concurred.

Order affirmed.

WILLIAM ZINSSER *et al.* Appellants, *against* ADOLPH SEILER, Respondent.

(Decided February 4th, 1878.)

Where notice of appeal from a judgment of a District Court in the city of New York has been seasonably served on the justice, but no notice of appeal has been served on the adverse party, this court has power (under § 327 of the [old] Code of Procedure), after the time to appeal has expired, to allow an amendment to perfect the appeal by serving the notice of appeal on the adverse party.

The decision of this court in *Williams v. Tradesmen Insurance Co.* (1 Daly, 322), upon that point followed, and *Morris v. Morange* (17 Abb. Pr. 86) disapproved, and *People v. Eldridge* (7 How. Pr. 108), *Sherman v. Wells* (14 How. Pr. 522), *Bryant v. Bryant* (4 Abb. Pr. N. S. 138), held not to have directly decided the question.

APPLICATION made at general term for leave to appeal to the Court of Appeals from an order made by this court at general term affirming an order made by Judge ROBINSON, allowing the defendant to perfect an appeal taken by him to this court from a judgment of the First District Court in the city of New York, by serving the notice of appeal on the respondent in that appeal.

The facts upon which that order was made were as follows: A judgment in favor of William Zinsser and August Zinsser, the plaintiffs, against Adolph Seiler, the defendant, was entered in the First District Court on June 15th, 1877; the undertaking required on appeal to the Court of Common Pleas was filed and approved the same day. On July 3d,

Zinsser v. Seller.

1877, the notice of appeal was served on the justice's clerk and the plaintiffs' attorneys. No notice of appeal was served on either of the plaintiffs personally until August 14th, 1877, more than twenty days after the entry of the judgment, although both plaintiffs were residents of, and then doing business in, the city of New York.

Lewis Sanders, for appellants.

Ambrose Monell, for respondent.

CHARLES P. DALY, Chief Justice.—It has been uniformly the practice of this court since the amendment of section 275 of the Code of 1848, by the adoption of section 327 of the Code of 1849, to allow a party who has in good faith given a notice of appeal, but has failed through mistake to perfect it by serving a notice, both upon the clerk and the respondent, to perfect the appeal by the service of the additional notice upon the one upon whom it should have been served, deeming that we had power to do so by the amendment made in 1849. None of the cases referred to upon this motion, except *Morris v. Morange* (17 Abb. Pr. 86), have held the contrary, although containing dicta creating doubt as to the power of the court to do so. In *The People, &c. v. Eldridge* (7 How. Pr. 108) the question was not before the court, as no application had been made to the court below to cure the defect by a service upon the party instead of upon the attorney. In *Sherman v. Wells* (14 How. Pr. 522), the respondent was required to accept notice of appeal, because, the judgment having been entered before the costs were taxed, it was held that the thirty days did not begin to run until the service of a notice of the judgment, after it had been settled what amount of costs were included in it. In *Bryant v. Bryant* (4 Abb. Pr. N. S. 138), no notice of appeal from the order sought to be reviewed had been served, but by mistake the notice referred to a different order; and what was asked was, to allow the party to appeal after the time for appealing had expired. In *Morris v. Morange* (17 Abb. Pr. 86), the appel-

Vol. VII.—30

Devlin v. The Mayor, &c., of the City of New York.

lant served notice upon the clerk by mail, and his application to perfect his appeal by allowing him to serve the notice regularly upon the clerk was denied. The decision was affirmed, although in reviewing it no notice is taken of the point whether the court below had the power or not to allow the appellant to perfect his appeal. The only point considered, as would seem from the opinion, was, whether a service by mail upon the clerk was sufficient. At the same time (December, 1863) that *Morris v. Morange* was decided, the question was brought before the general term of this court in *Williams v. The Tradesmen Ins. Co.* (1 Daly, 322). There, the service of the notice was upon the attorney, instead of the respondent. The appellant had been allowed by the court below to perfect his appeal, and the order so providing was, after full consideration of the point, affirmed upon appeal.

The application for leave to go to the Court of Appeals should be denied.

LARREMORE, J., concurred.

Ordered accordingly.

CHARLES DEVLIN, Respondent, *against* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK (Impleaded), Appellant.

(Decided February 4th, 1878.)

A referee appointed by the court in a referable action to hear and determine the issues, where he is not willing to act for the statutory compensation, and one of the parties is unwilling to agree to pay a higher rate, should not declare that he will go on with the reference, and expect to be paid such higher rate, and look to the prevailing party therefor, and hold his report as security for such payment unless ordered to give it up without such payment; and where in such a case the counsel objecting to such increased compensation refused to proceed, and with-

Devlin v. The Mayor, &c., of the City of New York.

drew:—*Held*, that they were justified in refusing to proceed with the trial under such conditions, and that the referee should be removed and another appointed in his place.

APPEAL by the defendant, the corporation of the city of New York, from an order of this court made by Judge JOSEPH F. DALY at special term, denying a motion to remove William H. Leonard, Esq., as referee, and vacate the order of reference to him.

The facts appearing on the motion are shown in the following extract from the opinion delivered on denying the motion :

“ This cause has been at issue in this court several years ; it was referred in 1865, tried, and a decision rendered in favor of plaintiff. The judgment entered on that decision was reversed by the general term of this court, and judgment absolute ordered in favor of the defendants, the mayor, aldermen and commonalty of the city of New York against the plaintiff and the other defendants. (Reported in 48 How. Pr. R. 457.) Upon appeal the Court of Appeals affirmed the judgment of the general term, so far as the reversal of the judgment entered on the report of the referee was concerned, but reversed it in so far as judgment absolute for the corporation was rendered, and ordered a new trial. (Reported in 63 N. Y. 8.) The cause was subsequently referred by this court to the Hon. Wm. H. Leonard, to hear and determine.

“ It appears that when the respective parties attended by counsel before the referee, on April 18, 1877, pursuant to notice of hearing, the following proceedings took place—the plaintiff being represented by Mr. Joseph J. Marrin, the corporation by Messrs. W. O. and C. A. H. Bartlett, and the defendant Donaldson by Mr. T. C. Cronin.

“ The referee : There is sometimes an objection that the statute allows only \$3 a meeting for referee's fees. Is there an agreement between you in relation to that ? I am in the habit of charging \$5 an hour.

“ Mr. Bartlett : I think that is an exceedingly reasonable

Devlin v. The Mayor, &c., of the City of New York.

charge, but I am not instructed on that point ; I can only say that I presume the corporation counsel will agree to any customary charge ; I shall not object to any myself ; I don't want it to appear hereafter, myself, that I surrendered any interests of the city ; I think it is a monstrous statute.

"The referee: I could not act as referee at \$3 a sitting.

"Mr. Cronin: By the next meeting you will be informed as to that.

"Mr. Bartlett: Yes; I have no apprehension that there will be any difficulty about it.

"For this session I would pay it out of my own pocket; I will be responsible myself for this session, and if the corporation counsel objects I shall notify you of it, and I would refuse to proceed with the reference unless he does consent.

"At the subsequent meeting of May 10th, 1877, Mr. Bartlett, on behalf of the corporation, declined to stipulate for a higher compensation to the referee than the statute fees of \$3 (Code, § 313), and exhibited a letter to himself from the corporation counsel, in which the latter wrote that where there was no especial appropriation made by the city to pay referees' fees, and where a reference was ordered against his (the corporation counsel's) opposition, he would not agree to any charge greater than the three dollars per diem, the statutory allowance.

"At the next meeting (May 11th, 1877) the following proceeding took place while the stenographer who reports the proceeding was present.

"Mr. W. O. Bartlett, dictating to the stenographer.

"Mr. Bartlett says: Having refused yesterday to assent to any agreement for the payment of more than the statutory fees, Mr. Marrin to-day gives notice that the plaintiff will be responsible for any difference between the statutory fees and the charges of the referee.

"The referee: I do not choose to be beholden to the promises of either party unless they unite in the agreement; I will try this case, and when the case is submitted, and my decision is prepared, I will notify the prevailing party, and shall expect to charge the customary fee of five dollars an

Devlin v. The Mayor, &c., of the City of New York.

hour, and five dollars for every adjournment, which I shall expect the prevailing party to pay, and shall consider myself entitled to hold my report as security until it is paid or until the prevailing party assents to doing so, unless the court shall order me to deliver it without such payment.

“Mr. Bartlett: Whereupon Mr. Bartlett refuses to go on.

“Mr. Cronin: The defendants, other than the city, are willing to stipulate, under the section of the Code, in writing, that the fees of the referee be fixed at a larger sum than the sum of three dollars a day, and at the usual rate of five dollars an hour.

“Mr. Burwell (from the office of Scott and Crowell, having come in since the stenographer began to take notes): And the defendant, Thomas Hope, concurs in what Mr. Cronin says.

“Mr. Marrin: Mr. Marrin says that these minutes are now being taken by the stenographer from the mouth of Mr. Bartlett after what was really said had been said before the referee, and before the stenographer began to take his minutes, and that what he, Mr. Marrin, said was that, as far as the plaintiff was concerned, he was willing to agree to the usual charges in excess of the statutory allowance, and that this was said by him before any thing was said by Mr. Bartlett about withdrawing from the case or refusing to go on.

“Mr. Bartlett: Mr. Bartlett says that he understood the words of Mr. Marrin to be precisely as he has stated them, and he has no earthly doubt whatever that he spoke those words; that he believes he spoke them now, and that being called upon to answer whether they were correct or not he refused to deny them or dispute them.

“He understood Mr. Marrin to say that the plaintiff would be responsible.

“Mr. Marrin: Mr. Marrin says that he did not refuse to answer any question that Mr. Bartlett put; but that a question arising before the referee as to who was entitled to speak first, Mr. Cronin or himself, he submitted himself to the order of the court until such time as he should be allowed to speak, and that so far as the words “being responsible for” go he did use them and uses them now, but uses them in

Devlin v. The Mayor, &c., of the City of New York.

connection with the other part of what he said, to wit: that the plaintiff was willing to agree under the statute with the other defendants and be responsible for his share of the fees, in excess of the statutory allowance.

"Mr. Bartlett: There is a legal point involved here.

"Mr. Marrin: Won't you state it?

"Mr. Bartlett: I don't suppose, your honor, after an offer is made by one party to be responsible for an amount of fees that the other party refuses assent to, will think for a moment of going on with the reference.

"The referee: I do not see any reason why I should not proceed.

"Mr. Marrin: Suppose we go before another referee, Judge Mitchell for instance, and you won't agree to pay him more than three dollars a day, and then we go before another and another referee, and so defeat altogether the order of the Court.

"The referee: It is idle to discuss this—proceed with the case.

"The Messrs. Bartlett then withdrew.

"Upon these proceedings the corporation counsel moves for an order removing the referee and vacating the order of reference."

William O. Bartlett, for appellant.

T. C. Cronin and *J. J. Marrin*, for respondent.

BY THE COURT*—The statute has fixed the amount of the referee's fees, unless the parties agree to pay a larger sum. They did not agree in this case. The counsel for the corporation refused to assent to any agreement for the payment of more than the statutory fees. The only course then for the referee was to proceed with the reference at the statutory rate of compensation, or to decline to act. This was not his decision. He decided that he would try the case; and after it was submitted, and his decision prepared that he would

* Present, CHARLES P. DALY, Ch. J., and ROBINSON, J.

Meyers v. Bennett.

notify the prevailing party, "when he should expect to charge the customary fee of \$5 an hour, and \$5 for every adjournment, which he should expect the prevailing party to pay, and should consider himself entitled to hold his report as security until that amount was paid, unless the court should order him to deliver it without such payment."

We are of opinion that he could impose no such conditions. It was placing the counsel of the corporation in a very unpleasant position to require him to go on and try the case with that understanding after his opponent had agreed, and he had refused to agree, to the rate of compensation above named. It would not, we feel certain, have in any way affected the decision of the referee, but we are of opinion that a suitor cannot and ought not to be required to go on and try a cause before a referee under such circumstances. In our opinion he has a right, as he may be liable for the payment of the fees, to require that the referee shall act for the compensation fixed by the statute, or that a new referee be appointed. We think, therefore, that the motion below should have been granted, and that the court should have appointed another referee.

The order appealed from should, therefore, be reversed.

Ordered accordingly.

GEORGE E. MEYERS *et al.* Respondents, *against* JAMES
GORDON BENNETT (Impleaded), Appellant.

(Decided February 4th, 1878.)

Under the Mechanics' Lien Act, applicable to the city of New York (L. 1863, c. 500), as amended in 1866 (L. 1866, c. 752), labor done on premises in pursuance of a contract with a prior owner, cannot be the subject of lien as against a succeeding owner, and unless such lien had already been imposed before any transfer of the title is effected by deed or operation of law, any proceedings thereafter instituted under the act are entirely ineffectual, even to afford any right to a personal judgment between any of the parties to the contract.

Where, therefore, an owner of property in New York City made a contract for the

Meyers v. Bennett.

erection of a building thereon, and before the work was completed died, having devised the property in trust, and the contractor, under the direction of the trustee (who was also executor of the deceased), proceeded with the work according to the contract.—*Held*, that the filing of notices, after the death of the owner, in accordance with the provisions of the act, did not create any lien upon the trust estate, and that in proceedings to foreclose the liens claimed to have been acquired by the filing of such notices, a personal judgment could not be rendered against the trustee.

APPEAL by the defendant, Bennett, from a judgment of this court, entered on the report of Homer A. Nelson, Esq., who had been appointed referee to hear and determine the issues, in favor of the plaintiff and certain of the lienors, defendants.

The facts necessary to an understanding of the decision here are stated in the opinion.

John Townshend, for appellant.

Niles & Bagley, for respondent Meyers.

L. Laflin Kellogg, for respondent Murray.

John B. Perry, for respondent Ritch.

VAN HOESEN, J.—A contract was made on the fifth of February, 1872, between James Gordon Bennett (now deceased) and Edward Hall, for the mason work of a building to be erected according to certain specifications upon certain premises owned by the former, and constituting the entire lot fronting on the west side of Nassau street, between Ann and Fulton streets. The building was to be completed on or before the first day of April, 1873.

The work was to be paid for in monthly instalments as it progressed, to the amount of eighty per cent. of the value of the work, upon certificates of the superintendent and architect that the work had been done in a good, workman-like and substantial manner, and the balance of twenty per cent. paid on the like satisfactory completion of the whole.

Meyers v. Bennett.

It was further provided that if the contractor should, during the progress of the work, refuse or neglect to supply sufficient materials or workmen, the owner should have power to provide materials and workmen after three days' notice in writing to the contractor to finish said work, the expense to be deducted from the amount of the contract.

The contractor commenced the work on the 1st of May, 1872. James Gordon Bennett, who thus contracted with Edward Hall, died in May or June, 1872, leaving a last will and testament, by which he devised the premises and his other residuary estate to the defendant upon trust to collect the rents and profits, and after paying "taxes, assessments, interest, and other outgoings," to pay the residue to his daughter Jeanette during the lifetime of his wife; and on the death of the latter all such estate was to be divided equally between the defendant and his sister Jeanette. By a subsequent codicil the interest of Jeanette was limited to a life estate, with remainder to her children or descendants. Mrs. Bennett, the widow, died March 31st, 1873, and as to Jeanette the trust continues.

The referee finds that the defendant "individually, and as such trustee, ratified and adopted said contract with said Edward Hall," and authorized and directed him to proceed under the same, and erect said building, but fails to find the further allegation of the claimant that he "assumed" said contract. The finding is ambiguous, and is not founded upon any agreement shown to have been made by the defendant upon any new and independent consideration, nor by any writings signed by him, to create any liability within the provisions of the Statute of Frauds. It establishes no personal claim against the defendant after the death of his father. The contractor, Hall, after the death of the father, proceeded to perform the work under the original contract, and nothing is suggested by the pleadings or testimony exempting the estate of the father from the payment of any debt arising under his contract. The finding that the defendant "ratified and adopted" the contract and directed the

Meyers v. Bennett.

contractor to proceed to erect the building, is but a finding that he did not attempt to repudiate or rescind it, but fully recognized the obligations of his testator. The obligations of his father, or of his estate after his death, were in no way superseded, altered or modified by that event. It is only by force of the devise to the defendant of the legal title, as trustee of the whole and remainder-man as to one-half of the property, that any personal obligation can be suggested. The contract was not for the personal services of the contractor nor was it of such a character as to be affected by the testator's death. The claims of the alleged sub-contractors and lienors in whose favor personal judgments have been rendered against the defendant, as also those of the lienors, William and Thomas Ritchie and Patrick Murray, which have been adjudged to exist as against the property on which the work was performed by them, or for which materials were furnished, wholly depend in the first instance upon the right of Edward Hall, the contractor.

The alleged liens were all imposed in September and October, 1872, which was three months after the death of James Gordon Bennett, the contracting owner. None of them, so far as established by the judgment, existed upon any debt personally created by the defendant as owner, but were all founded upon the contract made by the testator with Edward Hall.

The contract not being of such a character as to be affected by the testator's death, was one that continued, notwithstanding the death or transfer of the interest of either party, but no such personal assumption of any of its obligations by the defendant having been shown, the personal judgments awarded against him cannot be sustained.

Ownership of the property by a contracting owner must, in my opinion, *exist throughout performance of the original contract*, and be concurrent therewith, in order to render the property liable for work done thereon, and authorize the imposition of a lien under the Mechanics' Lien Law of 1863. No lien can be created on the interest of any person as

owner of the premises, except he has himself, or by his agent, entered into the contract under which the work was performed (*Muldoon v. Pell*, 54 N. Y. 269; *Knapp v. Brown*, 45 N. Y. 207). Should a third party, disconnected with the title, upon his own responsibility, contract for such work, the law contemplates no interference with the title of the owner of the property, nor does it accord to any one any right of lien therefor. It is the title of the *contracting owner* only that is made the subject of any such liens, and it can only be made effectual as against such title as existed in him when the lien of the contractor or sub-contractor is imposed.

Therefore, work done on premises in pursuance of a contract with a prior owner is not the subject of lien proceedings under the act of 1863 as against a succeeding owner, and unless such lien has already been imposed before any transfer of the title is effected by deed or operation of law, any proceedings thereafter instituted under the act are entirely ineffectual, even to afford any right to a personal judgment between any of the parties to the contract.

The act of 1863, as amended by chap. 752 of the Laws of 1866, only authorizes a sale of the right, title and interest which the owners shall have in the premises at the time of the filing of the notice of lien (Laws 1866, c. 752, vol. 2, p. 1634). The amendment materially varied the rights of lien created by the act of 1863, which was upon the house or building and the appurtenances, and the lot on which the same should stand, notwithstanding any sale or transfer made after the commencement of the work or furnishing of material. (L. 1863, c. 500, §1.) This, as remarked, has reference to the *contracting owner*, and not to subsequent purchasers who have succeeded to the title before the lien was created, even if they have assumed payments of the claims (see cases cited in Guernsey's Mech. Lien Law, § 89 to 92; *Quimby v. Sloan*, 2 E. D. Smith) 594; and it is the fourth proposition affirmed by this court in the case of *Bailey v. Johnson* (1 Daly, 61), supported by numerous authorities therein cited.

The death of the testator and contracting owner, and his devise of the premises to the defendant upon trusts, which

Harley v. The Eleventh Ward Bank.

have been accepted, constituted the latter a purchaser in good faith with a title entirely distinct from that of his testator. Any inchoate right, either to the lien or to its enforcement by proceedings in this court, abated by the testator's death. (*Leavy v. Gardiner*, 63 N. Y. 624). The trustee was without any authority to enter into any such contract or create any lien upon the premises in question (part of the trust estate) for the purpose of erecting buildings thereon.

Under these views I am of opinion the judgment should be reversed and a new trial ordered, with costs to abide the event.

JOSEPH F. DALY, J., concurred.

Judgment reversed and new trial ordered, with costs to abide the event.

GEORGE HARLEY, Respondent, *against* THE ELEVENTH
WARD BANK, Appellant.

(Decided February 4th, 1878.)

Where the plaintiff deposited with the defendant for collection a sight draft which the defendant sent to its agent, a corresponding bank, for collection, and such correspondent, before the draft had been collected, but supposing that it had been, credited the amount thereof to the defendant, who thereupon gave credit therefor to the plaintiff, and the correspondent bank afterwards having discovered its mistake charged back the amount of the draft to the defendant, and the plaintiff, being notified of these facts, refused to take back the draft or have the amount of it charged to his account, and the defendant thereupon accused its correspondent with delay in not returning the draft, and stated that it would be compelled to look to it for payment of it, and afterwards rendered the plaintiff an account without charging the draft back to him, and continued for two years to render him accounts in the same way,—*Held*, that there was an account stated in respect to the draft, which precluded the defendant from denying its liability to the plaintiff therefor.

APPEAL by the defendant from a judgment of this court, entered upon the report of a referee appointed to hear and determine the issues.

Harley v. The Eleventh Ward Bank.

The action was brought by the plaintiff, who had been a dealer and depositor with the defendant, to recover from it \$885 alleged to be due as the balance unpaid of an account stated between the plaintiff and defendant of \$3,168 95, made on May 8, 1875.

The defendant answered that in the account stated the sum of \$800 had been erroneously, and by a mutual mistake of the parties, credited to the plaintiff.

The facts upon which the defendant sought to have this sum of \$800 deducted from the balance shown by the account in favor of the plaintiff are stated in the opinion.

F. N. Bangs, for appellant.

Edward Patterson, for respondent.

LARREMORE, J.—It appears from the testimony that plaintiff was a dealer and depositor of moneys with the defendant. That on November 12, 1872, he deposited with the bank for collection a sight draft for \$800, drawn by him on one J. W. Martin, of Andover, Connecticut, who was indebted to plaintiff in excess of that amount. The defendant forwarded the draft to its correspondent and agent, the Yale National Bank at New Haven, Connecticut, which forwarded it to the Rockville National Bank in said State, which gave it to the Adams Express Company for collection. An agent of that company saw Martin as he was about entering the cars at Andover and told him he had the draft, whereupon Martin requested the agent to hold the draft until his return within a day or two, and he would pay it. The Yale National Bank in sending its semi-monthly statement to defendant up to November 15, 1872, credited the amount of the draft, supposing it had been paid. The defendant thereafter, on November 18, 1872, believing the draft to have been paid, credited the amount to plaintiff's account. The draft was not paid, and was returned to defendant by the Yale National Bank, December 3, 1872, with notice of its non-payment. It was returned by defendant's cashier to the

Harley v. The Eleventh Ward Bank.

Yale National Bank, December 4, 1872, with a letter containing the following statement: "You credited us with the amount of the draft as per your statement of accounts November 15, and we paid the money to the party here, who declines to make it good in consequence of the length of time after the payment to him. There has been a great delay somewhere which I would be pleased to have explained. Send the draft on at once and urge its payment."

About December 17, 1872, the Yale National Bank returned the draft with a letter of explanations of the delay, and also sent its semi-monthly account to defendant up to December 15, 1872, wherein it appeared that the amount of the draft had been charged back. The plaintiff was notified of these facts, but refused to take up the draft or to be charged with the amount thereof. The defendant then wrote the Yale National Bank, December 18, 1872, disputing the amount charged on account of the draft, and stated: "The draft was presented and not paid, and should have been returned at once; we will be compelled, under the circumstances, to look to you for the payment of it."

With full knowledge of all the facts, defendant, on December 27, 1872, accounted with plaintiff, showing a balance due him of \$6,715 65, in which sum the amount of said draft was continued and allowed. And in each subsequent accounting between the parties up to and including May 8, 1875, the plaintiff was allowed the credit of the draft, and the question now raised is, whether the defendant is not estopped from impeaching the correctness of an account after so long an acquiescence in its validity.

If there was any doubt as to plaintiff's liability, it was settled in his favor by the defendant. With full knowledge of all the facts, defendant accepted and acted upon plaintiff's theory of the case, and sought to charge its own agent with the loss. In its letter of December 18, 1872, to the Yale National Bank, such intention is plainly expressed. No fraud or mistake is shown by which the defendant was misled or deceived. (*Lockwood v. Thorne*, 11 N. Y. 175; 18 N. Y. 285.)

Harley v. The Eleventh Ward Bank.

It appeared that the account of December 27, 1872, was not only stated, but settled; and it was also ratified and re-affirmed by each subsequent accounting through a period of over two years. Plaintiff resisted the claim at the outset on the ground of defendant's want of diligence in its collection. The defendant recognized this in the correspondence with its agent, refused to accept Martin's offer to pay fifty per cent. of the indebtedness, and rendered account after account in which it was entirely ignored.

I think the defendant should be held to its own interpretation of the transaction, and that the judgment should be affirmed.

ROBINSON, J.—Payments voluntarily made by one against whom a claim is made as of right, and by whom it is assented to, cannot be reclaimed. The credit given by the defendant to plaintiff of the \$800 draft in question they might have cancelled upon being advised of their mistake, had the failure to collect the draft arisen through no default of theirs. But after having been fully apprised of its non-payment, of plaintiff's refusal to any discharge of the credit because of want of diligence on their part, or of their sub-agents, in its collection, and of Martin's failure while presentation was delayed, and having thereafter asserted against their sub-agent, *in their own right*, a claim for damages for their neglect, predicated upon their positive assertion that they had, in consequence of that neglect, paid their own employer (the plaintiff), and as his conceded damages for their neglect, the amount of the draft: and further, after having continued the credit uncanceled for two years and a half, and having during that time made no attempt to modify or correct it, but in their numerous accounts rendered making no intimation of any dissent from its correctness, I fail to discover how such subsequent accounts, prepared and rendered under full knowledge of the facts, could be regarded as other than "accounts stated" without legal impeachment for the alleged mistake occurring in November, 1872, in respect to the Martin draft.

Payments are transactions wherein both debtor and cred-

Harley v. The Eleventh Ward Bank.

itor agree in the application of the money paid or consideration given as being to the very intent and purpose suggested and agreed upon between them. No mistake occurred in this case in the continued assertion of the plaintiff's claim, that the credit given him in his bank account for the draft should be maintained, nor in the acquiescence by the defendants in that claim in the subsequent transactions between the parties, and the repeated acquiescence in, and acknowledgment of, its justice and propriety until May, 1875. Other considerations of an equitable character also *estop* the defendants. They were offered by Martin fifty per cent. of the debt, which they refused, and they then (as they never had done before) neglected to advise the plaintiff they should look to him *alone* for the amount of the draft. The credit so asserted in November, 1872, and acquiesced in by the defendants, and continued unaltered without further question until in May, 1875, must in every aspect be treated as then made, and be held as a legal payment into the bank, through deposits made for all purposes of a general bank account, and as recognized in all the subsequent accounts between the parties, as evidenced by plaintiff's pass books and the balancing or settlements of balances therein on various occasions, as shown by the testimony. The subsequent attempt of the defendants in May, 1875, to return the draft and disavow and annul the credit made and acquiesced in from November, 1872, was of no avail.

I concur with Judge Larremore in an affirmance of the judgment.

CHARLES P. DALY, Ch. J., dissented.

Judgment affirmed.*

* Affirmed by the Court of Appeals, March 18th. 1879.

Flaherty v. Greenman.

MARY M. FLAHERTY, Respondent, *against* GEORGE
GREENMAN *et al.* Appellants.

(Decided February 4th, 1878.)

Where the defendants were common carriers of freight and passengers by steamboat from New York City to Sag Harbor, L. I., and the plaintiff's trunk was delivered on board of their boat, marked with the plaintiff's name and "Sag Harbor, L. I.,"—*Held*, that they were answerable for a failure to deliver it in the absence of evidence repelling the presumption of loss through their negligence, and that the defendants were not entitled to have the jury instructed that if the trunk was carried without any ticket being purchased by the plaintiff she could not recover.

Held, further, that this question has been settled by the Court of Appeals in *Fairfax v. The N. Y. Central & Hudson River R. R. Co.* (67 N. Y. 11), and that therefore this court should not make an order, under L. 1874, c. 322, for the purpose of allowing the defendants to have the question reviewed by the Court of Appeals.

Held, further, that although there was no allegation or admission in the pleadings that the defendants were carriers of freight (the allegation of the complaint being only that they were carriers of passengers and baggage), that the court on appeal might and would, in order to sustain the judgment, conform the pleadings to the proof by allowing the complaint to be amended by inserting such an allegation.

MOTION made at general term that it make an order, under L. 1874, c. 322, stating that there was involved in the case some question of law which ought to be reviewed by the Court of Appeals.

The action was for the loss of the plaintiff's trunk which, it was alleged, had been lost by the negligence of the defendants while in their charge as common carriers of passengers and baggage between New York City and Sag Harbor, L. I. The plaintiff had a verdict and the judgment thereon was affirmed at general term.

The facts which the appellants claimed showed error on the trial are stated in the opinion.

Butler, Stillman & Hubbard, for the motion.

Roe & Marklin, opposed.
Vol VII.—31

Flaherty v. Greenman.

CHARLES P. DALY, Chief Justice.—To authorize us to send a case to the Court of Appeals, we must, by statute, state in the order that there was involved a question of law which ought to be reviewed by the Court of Appeals (L. 1874, c. 322, p. 378), and we cannot so certify in this case, as the law governing it has been settled by that court.

The point raised is, that the defendants were answerable for the loss of the trunk only as baggage in the event of a contract between them and the plaintiff to carry her as a passenger; and as there was conflict upon the question whether she had or had not purchased a ticket, that they were entitled to have the jury instructed that if the trunk was carried without any ticket being purchased by the plaintiff she could not recover.

We held that if the trunk was delivered on board the steamboat, marked, as the plaintiff testified, "Mary M. Flaherty, Sag Harbor, L. I.," they were answerable for the failure to deliver it, in the absence of evidence repelling the presumption of a loss through their negligence, and it is this ruling which the defendants desire to review in the Court of Appeals.

That the law has been settled upon this point by the Court of Appeals, will appear after a statement of the facts which we must assume were found by the jury from the verdict they rendered.

The testimony given on the part of the defendants created a very strong presumption that the trunk was never delivered on board the defendant's steamboat, but was probably, by mistake, put by the expressman upon some other steamer. But the jury found for the plaintiff, and we must, consequently, assume that they found the facts to be as testified to by the expressman, and his testimony shows a delivery of the trunk on board the defendant's boat, under circumstances which bound them for the due delivery of it in Sag Harbor, unless their inability to do so arose from facts showing its loss without any negligence on their part.

His statement is, that when he brought the trunk to the "Coit," about half-an-hour before the departure of the boat,

Flaherty v. Greenman.

he found several persons there, but no one acting in the capacity of receiving baggage; that a man was coming up the gang-plank whom two or three weeks afterwards, the witness saw on the deck in the act of receiving baggage from a coach containing ladies, and who was then giving directions to the coachman where to put the baggage on board the "Coit;" and ordering other baggage to be carried forward by a man who had a hand truck. The expressman testified that he asked the man thus subsequently identified as employed in giving directions respecting baggage, where "the baggage was to go that went to Sag Harbor," and that the man answered, "Over there," pointing to a particular spot on the boat where there were several packages and trunks; and that a person was standing by the baggage whom the witness identified in court as the witness Geary, the baggage master of the boat, and whose duty it was, as he testified himself, to receive all the baggage that came on board. The expressman swore that he then took the trunk upon his shoulder, carried it on board the boat, and placed it by the other baggage without asking for a receipt, as he never took receipts. This was ample evidence of the delivery of the trunk on board the boat, and into the custody of the defendants' agents, for whether the man who directed him where to place it had or had not, at that time, any duty in respect to baggage, the baggage master of the boat, whose duty it was to receive all baggage, was standing by the spot where the expressman placed the trunk; and the expressman says he also asked him where the Sag Harbor baggage went, and that he answered, "There."

There can be no doubt, assuming, as we must do, that these were the facts, that there was a delivery of the trunk into the custody of the defendants' agents, and although the plaintiff did not go in the steamboat that day, as she did not reach the pier until after the boat had left, and although a ticket may not have been purchased for her, although there was direct evidence that one was purchased on board of the boat that morning, still the defendants, from their own testimony, assumed, in respect to a trunk so left, the responsibility

Flaherty v. Greenman.

of common carriers, as their own witness, an officer of the boat, who had charge (and had upon that day) of all the baggage put on board of it, testified that if the person who demanded a *piece* of baggage at Sag Harbor as owner, had no check for it, there would be a freight bill upon it. But, independently of his statement, the defendants would undoubtedly have been entitled to charge for the carriage of the trunk to Sag Harbor if the plaintiff had neither gone in the boat nor purchased a ticket, and they were not bound to deliver it until the charge for its transportation was paid. This is too plain for comment, and affords no support for the assumption of the defendants, on this appeal, that their obligation in respect to the trunk was simply that of gratuitous bailees. That the defendants were carriers of freight as well as of passengers, in the steamboat, appears by the evidence of their purser, who testified that he made out the freight bills and received the freight. The complaint is simply that they were common carriers of passengers and baggage for hire. The averment that they carried baggage for hire would probably be sufficient to charge them for the non-delivery of the trunk under the facts proved in the case; but even if it were not we can, and in support of the verdict will, conform the pleadings to the evidence, especially where it is the evidence given by the defendants, and in respect to the appellant's suggestion that the general term has no power to make such an amendment, it is sufficient to refer to the numerous decisions of the Court of Appeals to show, not only that we have such power in cases like this, but possess powers, in this respect, of a most extensive nature. See the decisions of the Court of Appeals upon this point, collected in *Tooker v. Arnoux*, decided in the last January term.

The Court of Appeals decided in *Fairfax v. The N. Y. Central R. R. Co.* (see opinion submitted by respondent*) reversing the judgment of the Superior Court of this city; that the defendants, who took charge of the plaintiff's baggage in

* Now reported in 67 N. Y. 11.

Stilwell v. Hernandez.

Troy, carried it to New York, and deposited it in their warehouse, were answerable for the non-delivery of it to the plaintiff, although he was not a passenger upon their road; the ticket which he purchased in Montreal for New York being for the Rensselaer & Saratoga Railroad to Albany, and from thence by the People's line of steamboats for New York. It was held that as the plaintiff's portmanteau was taken in charge by the defendants, carried to New York and deposited in their baggage rooms, they incurred the responsibility of warehousemen at least, and as it had disappeared when the plaintiff demanded it, and they could give no account of its disappearance, that this was *prima facie* evidence of negligence.

That decision covers the present case. In this case, as in that, the baggage was delivered into the custody of the defendants' agents, and failing to deliver it when demanded, or to give any account of it, a loss through their negligence was to be presumed. In that case no contract existed with the Central Railroad to carry the plaintiff as a passenger, but their liability was founded simply upon the fact that they took the plaintiff's baggage into their custody and failed to deliver it on demand, or to give any account of it.

The application to go to the Court of Appeals, therefore, should be denied.

ROBINSON and LARREMORE, JJ., concurred.

Motion denied.

SILAS M. STILWELL, Respondent, *against* RAMON MARTINEZ HERNANDEZ, Appellant.

(Decided February 4th, 1878.)

Where the complaint alleged a retainer of the plaintiff as counsel and attorney at law and attorney in fact, to procure the release of certain property belonging to the defendant, which had been seized and was detained by the Spanish Government, and an agreement that the plaintiff, upon the release of the property, should receive a specified compensation, and that the plaintiff had obtained the release of the property, and demanded judgment for the amount specified in

Stilwell v. Hernandez.

the agreement as such compensation,—*Held*, that there was no ground for ordering a bill of particulars of the services performed by the plaintiff, since under the complaint the plaintiff would be entitled to recover upon proving the making of the agreement and the release of the property, and in case he failed to establish those facts, he could not recover the value of such services as he had performed under his retainer as counsel and attorney at law.

APPEAL by the defendant from an order of this court, made at special term by Judge VAN BRUNT, denying a motion for a bill of particulars of the plaintiff's claim.

The action was brought by the plaintiff to recover sixty thousand dollars for alleged services as an attorney and counsellor-at-law.

The complaint alleged that the plaintiff was an attorney and counsellor at law, and the defendant a native of Cuba, now residing in the city of New York. That in 1870 the property of the defendant in the island of Cuba having been embargoed by the Spanish Government, for his alleged complicity in the rebellion in that island, he "retained and employed" the plaintiff "of counsel and as his attorney at law, and in fact, to take such proceedings at law or in equity, or by or through international negotiation or comity, or otherwise, as to this plaintiff should seem best, to obtain from the government of Spain a release of his property." That the plaintiff accepted such retainer and employment, "and entered upon the performance of the duties of such employment, and devoted the larger part of his time in and about the business of obtaining the release of said real estate and property to said defendant as aforesaid." That about a year thereafter, and "after the plaintiff had devoted a long time, with great labor, in and about the business of said defendant as aforesaid," the defendant agreed to give the plaintiff as payment for the services already rendered, and "for such services as plaintiff should thereafter render in and about obtaining the removal of the embargo," a sum equal to the rents and profits of the property during the continuance of the embargo, and the plaintiff to be entitled to no payment for his services "in case said embargo should not be removed." That on making the said agreement as afore-

Stilwell v. Hernandez.

said, this plaintiff continued thereafter to devote his time and labor to the matter and business of obtaining the release of said real estate and property, and the removal of the said embargo therefrom, and by constant and close attention, and by arduous and continued labor for a period of more than three years," the plaintiff obtained the release of said property. That the value of the rents during the embargo was forty thousand dollars in gold, which sum the defendant refuses to pay in compensation for said alleged services; that said sum was due plaintiff in June, 1875, when the property was released, and judgment was demanded for sixty thousand dollars damages.

The motion was made on the summons and complaint and an affidavit of the defendant, in which he swore that he intended in good faith to defend the action, and was ignorant of the particulars of the claim made against him, and could not properly answer the complaint until he was furnished with a bill of particulars of the plaintiff's claim; the affidavit also included the ordinary affidavit of merits.

Edmund Wetmore, for appellant, argued that under the complaint as drawn the plaintiff might fail in his special contract and still recover under a *quantum meruit* (*Sussdorf v. Schmidt*, 55 N. Y. 319), and that in principle there was no difference between the action in its present form and under the form of a *quantum meruit*, so far as the propriety of a bill of particulars was concerned. (*Sussdorf v. Schmidt*, 55 N. Y. 319; *Smith v. Lippincott*, 49 Barb. 398; *Fells v. Vestvali*, 2 Keyes, 152.) The allegations of the complaint in *Sussdorf v. Schmidt*, first cited, were identical in substance, so far as establishing a *quantum meruit* is concerned, with the case at bar (see said complaint in Vol. 253 of causes in Ct. of Appeals, Law Inst. Library).

Luthur R. Marsh, for respondent.

LARREMORE, J.—This is an appeal from an order denying a motion on defendant's behalf for a bill of particulars of

Stillwell v. Hernandez.

plaintiff's claim. The complaint sets forth some preliminary facts by way of inducement to, and explanatory of, the agreement, viz.: Defendant's representations that certain property owned by him in the city of Matanzas, island of Cuba, would produce a certain rental value and profit, that the Spanish Government had embargoed the property, and that he was desirous to have the same released, etc. Then follow averments setting forth a special contract as to plaintiff's services and compensation in case he procured the removal of such embargo; his performance of the agreement in this particular, and a demand and refusal of payment of a specific sum of which the agreement furnished the basis of computation. The only purpose to be served by a bill of particulars in such a case would be a disclosure of the evidence of the alleged facts, which is not allowable in a pleading.

Plaintiff's contract, as alleged, is express and entire, and must be proved as laid or the action fails. If he prove performance he is entitled to the compensation as fixed, no more, no less. Without such proof no recovery can be had for any amount. (*Ives v. Shaw*, 31 How. Pr. 54; *Fullerton v. Gaylord*, 7 Robt. 551.) No demand has been made for a copy of the account, but an appeal is made to the discretion of the court, in pursuance of § 531 of the Code, for a bill of particulars. This question was carefully examined and discussed by Judge Van Hoesen in *Orvis v. Jennings* (6 Daly, 434), recently decided by this court, and within the principles of that decision I think the order appealed from should be affirmed.

CHARLES P. DALY, Ch. J., and ROBINSON, J., concurred.

Order affirmed.

Waterman v. The Mayor, Aldermen and Commonalty of New York.

SIGISMUND WATERMAN, Appellant, *against* THE MAYOR,
ALDERMEN AND COMMONALTY OF NEW YORK, Re-
spondent.

(Decided February 4th, 1878.)

Since, by the charter of the city of New York (L. 1873, chs. 335 and 755), the police department is made a distinct and separate branch of the municipal government, and has complete control over the funds annually appropriated for its support and maintenance,—*Held*, that the plaintiff, who had been employed by such department, could not—at least in the absence of proof that the appropriations were insufficient to meet its necessary expenses—recover from the corporation of the city of New York for services rendered upon such employment.

The case of *Dannat v. The Mayor, &c.* (66 N. Y. 585), followed as controlling.

APPEAL by the plaintiff from a judgment of this court, entered on a decision rendered by Judge VAN BRUNT after a trial before him without a jury.

The facts are fully stated in the opinion.

Charles W. Gould, for appellant.

D. J. Dean, for respondent.

LARREMORE, J.—The plaintiff brought suit to recover for the balance of salary alleged to be due him as surgeon of the police from Sept. 17, 1873, to Jan. 3, 1876. He claims that his salary for that period was fixed by law at \$2,250 per annum (L. 1866, c. 861), that he has been paid only at the rate of \$1,000 per annum, and asks judgment for the difference.

On Sept. 15, 1873, the Board of Police Commissioners of the city of New York adopted the following resolution: “Resolved, that the following named physicians be appointed district surgeons, and assigned to districts, at an annual salary set opposite their respective names.

“Sigismund Waterman, 12th District . . . \$1,000.”

Waterman v. The Mayor, Aldermen and Commonalty of New York.

In pursuance of this resolution Dr. Waterman accepted the appointment and performed his duties thereunder as surgeon from Sept. 21, 1873, to Jan. 3, 1876.

The appointment above mentioned was made by authority of "an act to reorganize the local government of the city of New York," passed April 30, 1873 (L. 1873, c. 335, § 40), whereby the Board of Police was authorized to appoint surgeons of police. Section 43 of this act provides that every person connected with the police department of the city of New York on April 30, 1873, except as otherwise therein ordered, shall continue in office at the salary or compensation then legally paid, which is thereby fixed as the salary or compensation of the office held by such person under said act. But the police commissioners were empowered to "fix the salary and compensation of such clerks other than policemen whom they may be authorized by law to employ."

I shall first examine the question of defendant's liability upon the evidence, which, if not established, will obviate the necessity of considering the other points raised.

By the new charter hereinafter referred to (L. 1873, chs. 335 and 755), the police department was made a distinct and separate branch of the municipal government of the city of New York. The moneys required to meet its annual expenditures are apportioned on its suggestion, and placed to its credit, to be disbursed only on its proper official warrant.

The comptroller is required, on requisition of the Board of Police, to pay over the total amount annually estimated, levied, raised and apportioned for the support and maintenance of the police department (L. 1873, c. 755, § 7).

With all the funds at its disposal it is difficult to perceive how it could avoid any valid pecuniary obligation. Plaintiff should have first sought his remedy in this direction; either by mandamus against the board or its financial officer, or by suit against its members individually for misfeasance. It does not appear that the appropriations for this branch of the city government were insufficient to meet its expenditures, or that defendant has done or failed to do any act by which it has become primarily liable for the plaintiff's salary.

Waterman v. The Mayor, Aldermen and Commonalty of New York.

The case is not distinguishable in principle from *Dannat v. The Mayor* (66 N. Y. 585). In that case it appeared that the Department of Public Instruction was a branch of the municipal government, whose appropriations, like those of the police board, were drawn on its own warrant. Subsequently that department was made an independent corporation, with power to sue and be sued. But the court held that, whether as a department or a corporation, its creditors must exhaust their remedy against it, not because it was at that time a corporation capable of being sued, but because its appropriations and expenditures were regulated by statute, the provisions of which should be observed and followed.

The case just cited and the one at bar are, in my opinion, essentially the same, and the judgment should be affirmed.

ROBINSON, J., concurred.

CHARLES P. DALY, Chief Justice.—I concur in affirming the judgment. The case of *Dannat v. The Mayor*, referred to by Judge Larremore, is applicable, for although that was a case in which the claim was to be paid by the comptroller upon a draft of the Board of Education, in which it was held that the plaintiff had no action against the city until he had obtained the draft, and which he could by action compel the Board of Education to give, if he was entitled to it, and this is a case in which the salary is paid by the treasurer of the police board out of funds deposited by the city with the board for such purposes, the rule recognized and applied there is the rule in the present case, which is, that the city is not liable and cannot be sued until there is some default on its part. It was held in that case that if the comptroller refused to pay the draft when presented, having funds in his hands wherewith to pay it, he could be compelled by mandamus to pay it, or probably held liable in an action for his misfeasance in not doing so when the draft was demanded. The treasurer of the police board stands in the same position. He can be compelled to pay, if the salary is due and payable and he has funds in his hands to pay it. If the city has

Smith v. Allt.

placed the necessary funds in his hands, it has not, in the language of the opinion in that case, "omitted any thing to make it liable," and the plaintiff's remedy is not against the city, but against the treasurer, or against the board, if he withholds the payment under its direction, in a case where the plaintiff is lawfully entitled to the payment of the amount claimed.

Judgment affirmed.

MARY E. SMITH, Respondent, *against* EDMUND ALLT, Appellant.

(Decided February 4th, 1878.)

While the law is well settled in this State, that where a tenant for a year or more holds over the term the landlord has the option to treat him as a trespasser, or as a tenant for another year upon the same terms as those of the lease under which he had been occupying the premises; yet every continued occupation of the premises after the expiration of the term is not a holding over within this rule; and where upon the evidence it is not clear as to whether the tenant was not, with the consent of the landlord, remaining only pending negotiations for a new lease, with the understanding that in case a new lease was not made the tenant should surrender the premises and not be liable for any rent accruing thereafter, the question of whether or not there was a holding over should be submitted to the jury.

APPEAL by the defendant from a judgment of the Marine Court of the city of New York, entered on a decision of the general term of that court, overruling the defendant's exceptions to the direction of a verdict against him at trial term, and ordering judgment on the verdict.

The action was brought to recover \$225, being a quarter's rent of No. 15 Dutch street in the city of New York, from May 1st, 1876, to August 1st, 1876, upon the allegation that the defendant had leased and occupied the premises for two years prior to May 1st, 1876, and had held over his term.

The defendant answered that on March 30th, 1876, a fire had occurred on the premises, by which they were damaged so as to be untenable, and under the provisions of the lease he was discharged from the payment of any further rent until they were put in complete repair, and that they were not put in complete repair until May 25th, 1876. That from and before May 1st, 1876, he was negotiating with the plaintiff in regard to leasing the premises for another year after the expiration of the term, and that on May 8th, 1876, they having been unable to agree as to the rent to be paid, the plaintiff notified him that he must vacate the premises, and that thereupon he removed therefrom with all practicable despatch—on or about May 25th, 1876—and that he would have removed therefrom sooner had he not been prevented from so doing by the neglect and refusal of the plaintiff to put the premises in such a condition that he could remove his property therefrom.

The facts shown on the trial are stated in the opinion.

John Henry Hull, for appellant.

Henry Stanton, for respondent.

CHARLES P. DALY, Chief Justice.—The law is undoubtedly well settled, that where a tenant for a year or more holds over the term, the landlord has the option to treat him as a trespasser, or as a tenant for another year upon the same terms as of the previous lease (*Schuyler v. Smith*, 51 N. Y. 309). But that was not the point in this case. The question was whether there was a holding over within the meaning of this rule; a point upon which there was so much doubt upon the evidence, that the judge upon the trial could not assume that the legal conclusion upon the testimony was, that the defendant held over the term, either as a trespasser or as a tenant; and that as the plaintiff had a right to treat the holding over as a tenancy she was entitled to payment, and that there was no question for the consideration of the jury.

By the clause in the lease, the rent was suspended in the

Smith v. Allt.

event of fire until the building should be put in complete repair. A fire occurred on the 30th of March, 1876, and the building was not completely repaired until the 25th of May following, a fact which is not only sworn to by the defendant, but also by the plaintiff's own witness, Quin. Two of the plaintiff's witnesses, Smith and Fowler, swear that the repairs were all finished on the 1st of May; but one of them, Fowler, who was the carpenter employed by the plaintiff to make the repairs, afterwards contradicted his previous statement. He was asked when he "got through the job of repairing and quit the building," and he answered, "I have been at work there within three weeks," which would be about the 8th of February, 1877. He was further asked, "When did you get through with the repairs of the damages occasioned by the fire?" and he answered, "About the 15th or 20th of May" (1876).

The term ended upon the 1st of May, 1876, and the defendant, as early as the preceding February, informed the plaintiff that he meant to give up the third floor, and would leave unless he got the fourth floor for \$500, asking for a reduction of \$200. Plaintiff thought the reduction too large; was willing to make a reduction of \$100, but said:—"Let it stand over a little while, and *I will see about it.*" The fire occurred on the 30th of March. The fire was a very serious one: it burnt through the floor of the story occupied by the defendant, up to the fifth floor; his goods fell through to the floor below; the fire patrol took possession of the premises, and it was not until the 11th of April following that he got possession of his property. On the 5th of May, whilst the repairs were being made, the defendant met the plaintiff in the building and informed her that the fourth floor would not be enough for him. He showed her what he wanted. She said she would make the rent \$700. He declined to pay that amount; offered \$625, but she would not agree to it, and told him that he must go out as soon as he *possibly could*, which was not an easy matter, as he had heavy machinery, the removal of which was obstructed by the condition in which the building was, in consequence of the fire.

Smith v. Allt.

On the 8th of May following she sent for him; he saw her, and she told him he might have the premises he wanted for \$650. He said he would not pay it, and she replied that she would put him out if he did not give it to her. She then said, "Mr. Allt, will you give me \$650 for the room?" and he said, "I will not, Mrs. Smith;" upon which she replied:—"Well, Mr. Allt, *I don't want to give you any trouble*, but you must leave." He told her that whatever time he occupied the room of building after it was finished he was willing to pay for; to which she merely said, "Get out as quick as possible."

He was ready to move out on the 11th of May, but there was a difficulty in removing his heavy machinery, as the hoisting rope was burnt and scorched. In taking down some lumber the rope broke and damaged a part of the hoistway, and he could not get out his heavy turning lathes—weighing 1,500, 700 and 400 pounds—without a hoistway. On or about the 15th or 20th of May he applied to the plaintiff to put in a hoisting rope, but she was very angry; said she had something else to do besides fixing ropes; and he had to have the hoistway repaired himself; without which it would have been impossible to have got the machinery down.

He was ready to move out on the 11th of May, but through the causes above referred to was not able to do so until the 26th of May, and he vacated the premises entirely about the 1st of June. There was a conflict as respects some of these facts, which raised a question, not for the court, but for the jury. The defendant testified that he did no work upon the premises, and could not; and did not do any business there after the fire—that is, after the 30th of March.

As the rent was suspended from the time of the fire until the building was completely repaired; as the repairs were not finished until the 25th of May, and during that time the defendant could not do any work or carry on any business; and as he and the plaintiff had under consideration the occupation of a different part of the building from the part he had formerly occupied when it was repaired, but were unable to agree upon the rent which should be paid; and as his

Smith v. Alk.

remaining there after the 1st of May was because this matter was still under consideration ; and as the plaintiff, on the 8th of May, when they could not agree, recognized his right to leave—requested him to do so as soon as he possibly could, declaring that she did not want to give him any trouble, and necessarily implying that he was to have a reasonable time therefor under the circumstances ; and as three days after he was ready to move, but his moving out was delayed in consequence of the want of the hoistway, which he had to have put up himself ; and as he was engaged before the building was finished in moving out ; and as he vacated the premises altogether a few days after the building was finished, I fail to see how it can be assumed, as a matter of law, that it amounted to a holding over beyond the first of May, which made him responsible for a year's rent thereafter. The rule in respect to the effect of holding over is to have a reasonable construction ; and to apply it in a case like this would be doing an act of injustice to the defendant, and doing what the plaintiff herself did not intend, as is shown by her recognition, after the first of May, of the defendant's right to leave.

Where a tenant, under a yearly hiring, without saying any thing to his landlord, or where the landlord has not consented to any new or different agreement, holds over the term, the landlord has a right to assume that the tenant has concluded to remain for another year upon the same terms. But that is not this case. Here the parties were in negotiation, and such negotiation was continued over the first of May, for the occupation of a different part of the building at a different rent ; moreover, the part which the defendant had occupied was undergoing repairs and was not then in a condition in which either the defendant could use and enjoy it as before the fire, or in which any other tenant could come in and take possession of it. When that negotiation ended, as the parties could come to no agreement, the plaintiff's orders were, as I have said, for the defendant to leave as soon as he could. In a few days thereafter he made an effort in good faith to leave, and that he did not get his bulky prop-

erty away until more than a fortnight afterwards, was owing to the causes already recited. Where mutual acquiescence in a further term at the like rent is not inferable, the holding, to warrant the application of the rule, must be wrongful. It must be tortious in its character (*Schuyler v. Smith, supra*, pp. 314, 315), giving the landlord the right to treat the holding over as a trespass, or, if he so elects, as a continuation for another year upon the same terms. The tenant in such a case has no ground of complaint, as he had no right to remain after the expiration of his term, thereby enjoying the use of the premises and depriving the landlord of the opportunity of letting to another tenant. The plaintiff sought to show that the very day—the 8th of May—that the plaintiff told the defendant to leave as soon as possible, she gave him a written notice that as he had continued in occupation after the expiration of his lease, she would hold him as her tenant for another year upon the same terms. The two acts upon the same day—of ordering him to leave, and holding him as a tenant for another year from the first of May preceding—were not very consistent; but it is not necessary to dwell upon this, as the justice ruled out this testimony, and it did not, therefore, enter into either his deliberations or that of the general term upon the question of law.

The case, in my judgment, should have been submitted upon all the facts to the jury, as there was conflict as to some of them, and I think, therefore, that the judgment should be reversed.

ROBINSON, J., concurred.

Judgment reversed.

VOL. VII.—32

Arnold v. Morris.

EDWARD ARNOLD *et al.* Respondents, *against* JOHN J. MORRIS *et al.* Appellants.

(Decided February 4th, 1878.)

Where the plaintiffs had been induced to execute a bond of indemnity to secure from loss the sureties in a bond given to release an attachment on a stock of goods belonging to a business firm, upon the promise that the goods so released should be held for the plaintiff's indemnity and security against loss,—*Held*, that the plaintiffs had an equitable lien on such stock of goods for the amount they had been legally compelled to pay by reason of the bond of indemnity, and

Held, further, that such lien could be enforced as against the general assignee of the firm for the benefit of their creditors.

Held, further, that although an agreement that the firm might make sales from such stock of goods and purchase others to replace those sold, and that those so purchased might in their turn be sold and their place supplied by others, the plaintiffs' lien to open and shut, to let out and take in such goods, would make the agreement void as against creditors, or the assignee as their representative, yet that such an agreement was not established by evidence that the firm had promised to keep the stock of goods "replenished" up to its then value, and that the agreement must be construed according to the positive promise of the firm to "hold the goods" for the plaintiffs' indemnity or security, without considering the additional promise as to replenishing the stock,

Held, further, that under the agreement as thus construed, if the firm, without the plaintiffs' consent or knowledge, disposed of parts of the stock and put in other stock to supply its place, that the latter mingled with the former and became subject to the plaintiffs' lien.

Held, further, that the active members of the firm had authority, without the knowledge of a dormant partner, to create such a lien on the firm property when it was done for the benefit of the firm and to relieve the firm property from attachment.

Held, further, that in an action to establish the plaintiffs' lien on such goods the dormant partner was not a necessary party.

APPEAL by the defendants from a judgment of this court, entered on a decision rendered by Judge LARREMORE at special term, in favor of plaintiffs against defendants, Morris and Wilmerding, as assignees of Rouss, Bell & Co., for \$6,304 35.

Arnold v. Morris.

The suit was brought to establish an equitable lien upon the proceeds of certain property sold by the defendants as assignees of Charles B. Rouss and William J. Bell, composing the firm of Rouss, Bell & Co., of New York.

The facts of the case were as follows: Defendants, Charles B. Rouss and William J. Bell, together with Mary Jane Taylor (a secret partner, not joined as a party in this action), composed the firm of Rouss, Bell & Co., and owned a stock of goods in a store in Hoboken, New Jersey. On January 28, 1875, the goods were attached by the sheriff of Hudson County, New Jersey, by virtue of an attachment issued out of the Circuit Court of that county, at the suit of N. B. Falconer and J. B. Sleight against Charles B. Rouss, William J. Bell and John E. Weir. In order to relieve the property of Rouss, Bell & Co. from that attachment, the latter firm, by Rouss and Bell, procured Richard Muser and Frederick W. Muser to agree to become sureties in an undertaking for such purpose, if they were safely and properly indemnified therefor. Rouss and Bell thereupon, on February 3, 1875, procured these plaintiffs to execute to the Musers a bond of indemnity against all loss, damages, costs and expenses that might arise from the execution of such undertaking. The consideration for executing this bond of indemnity was the promise to plaintiffs by Rouss and Bell, acting for Rouss, Bell & Co., to hold the stock of goods so attached as an indemnity to plaintiff, and to keep the stock fully replenished up to its then value, which value had been appraised by the sheriff at \$6,312 50. The Musers thereupon executed an undertaking in the action against Rouss, Bell and Weir, in the sum of \$12,625, being double the value of the property aforesaid, the condition of which undertaking was that if the defendants in the action should perform the judgment of the court, or if the property attached or its value should be forthcoming and subject to the order of the court for the satisfaction of the judgments, the obligation should be void, but otherwise remain in full force. Upon the execution and approval of such undertaking, the sheriff delivered the attached property to Rouss, Bell & Co., whose

Arnold v. Morris.

business in the Hoboken store, carried on by them, had been for some days suspended by the seizure of the stock by the sheriff.

At the times of these occurrences Rouss, Bell & Co. were solvent. On May 12th, 1875, by Rouss and Bell, acting for the firm, they assigned all their property for the benefit of their creditors to the defendants John J. Morris and John C. Wilmerding, who accepted the trust, qualified, entered on their duties, took possession of all the property of Rouss, Bell & Co., including the stock in the Hoboken store (which then consisted of a large portion of the stock originally attached and new stock added to replenish it), and sold such stock at a valuation of fifty cents on the dollar, and realized therefrom \$5,100 51, which sum said assignees had in their possession when this suit was begun.

In the action on which the attachment had been issued judgments were recovered, about February 1, 1876, against Rouss, Bell & Weir, the defendants therein, to an amount exceeding \$6,312 50 in favor of the plaintiffs therein, Falconer & Sleigh, and of several other creditors of Rouss, Bell & Weir, who, under the laws of New Jersey, applied to be and were admitted to the rights of the plaintiffs in that action in respect of the attachment and undertaking aforesaid (Laws of N. J. of 1846, 1854, 1859, 1871, 1874). About March 1, 1876, Falconer & Sleigh commenced an action upon the undertaking against the Musers and Rouss, Bell and one Hugh A. McKee (who were joint makers with the Musers of the undertaking), of which action notice was given to the assignees of Rouss, Bell & Co. On April 1st the Musers paid to the judgment creditors \$6,312 50 under their liability upon their undertaking, and on the same day these plaintiffs paid to the Musers the sum of \$6,312 50 under their liability upon their bond of indemnity.

Judge LARREMORE on deciding the case at special term rendered the following opinion:

[After stating the facts of the case.] "The questions involved in the determination of this action may be considered in the following order:

Arnold v. Morris.

“1. What rights have the plaintiffs succeeded to as assignees of the attaching creditors?

“2. Did the alleged verbal agreement to hold the property for plaintiffs' benefit, made contemporaneously with their obligation to indemnify, raise a trust which a Court of Equity will enforce?

“3. Have plaintiffs acquired an equitable lien upon the proceeds of the property in the hands of the defendants?

“In answer to the first inquiry we are met by the act ‘for the relief of creditors against absconding and absent debtors,’ and supplements thereto (Nixon's Digest, 4th ed., 48). It is therein provided that property attached may be delivered to the party found in possession, upon the giving of a bond, with a condition that the defendant in the attachment suit shall perform the judgment of the court, or that the property or its value shall be forthcoming and subject to the order of the court for the satisfaction of such judgment.

“The bond executed by R. & F. W. Muser, and upon which the property in question was delivered over, was in the form last mentioned. After examination of the statute, I have little hesitation in holding that such bond enured to the benefit of the applying as well as the attaching creditors.

“The doubtful question at the trial was that which relates to the effect of the bond upon the lien of the attachment;—was such lien continued or revived by the recovery of the judgment of February 1st, 1876, or were the creditors to the attachment restricted to their right of action on the bond? No adjudication upon this precise point by the courts of New Jersey was cited, but the reasoning in *Vreeland v. Van Buren* (1 Zabriskie, 214) seems apposite and satisfactory.

“In that case the late Chief Justice Hornblower contended that as between the plaintiff in the attachment and the defendant the goods were not discharged by the giving of the bond; that they were to a certain extent in the custody of the law; that this appeared by the condition of the bond therein given—not that ‘the defendant,’ if judgment is

Arnold v. Morris.

given, 'will pay the debt, but that he will return the goods.' But the court held that the lien as to personal property was dissolved on the execution of the bond required by statute, and that the plaintiffs and creditors must then look to the bond only, unless a new lien was created on the property by placing an execution in the sheriff's hands before the defendant had aliened it. The property attached having been assigned and sold, and the proceeds taken to another State, the lien of the New Jersey creditors, if not before, was then discharged. The plaintiffs, as assignees of the judgments recovered upon the attachment, have no claim upon the property or its proceeds that can be enforced beyond the jurisdiction of the courts of New Jersey.

"2. Let us now consider the effect of the parol agreement of February 3, 1875. There was a conflict in the testimony as to its existence, but the weight of evidence is clearly in plaintiffs' favor. Arnold swears positively to the fact that the goods were to be held as an indemnity for the plaintiffs, and all their acts and subsequent transactions were consistent and in harmony with this statement. They wrote the letter that induced Muser Bros. to give the bond for the discharge of the attachment.

"Notwithstanding the testimony of Richard Muser that Opdyke, Steele & Co. first requested him to give the security required, and for which they promised him indemnity, yet he testified that he was to have indemnity also from the plaintiffs.

"The promise of Opdyke, Steele & Co. was not kept, and but for the bond given by plaintiffs on March 10, 1875, in pursuance of the agreement of February 3, 1875, the Muser Bros. would have paid the sum of \$6,312 50 for the privilege of becoming sureties in a matter in which they had no interest.

"The only testimony in opposition to such agreement was that of the defendant Rouss, who denied having made it. He also denied that he had dictated the letter until confronted by his own draft of it, and, even then, had no recollection of any thing about it but his own handwriting. Tak-

Arnold v. Morris.

ing into consideration his financial stress in February, 1875, property attached and speedy relief sought, application to plaintiffs and their prompt and effective action, the presumption in plaintiffs' favor as to the existence of the contract is strengthened into conviction. The plaintiffs having thus, as shown, incurred an obligation to Muser Bros. upon Rouss' original promise to them of indemnity by lien on the specific property, are thus entitled *inter sese* to enforce such lien (*Barry v. Ransom*, 12 N. Y. 462) and to follow the proceeds of such property wherever the same can be found and identified (*Haggerty v. Palmer*, 6 Johns. Chan. 437).

"When Rouss, Bell & Co. made a general assignment for the benefit of creditors, the property in question passed to defendants, subject to plaintiffs' lien and all existing equities (2 Edw. Chan. 483; *Haggerty v. Palmer*, *supra*).

"3. The right to follow these proceeds rests upon sound equitable principles:

"1st. A violation of the trust to keep the property for plaintiffs' benefit and indemnity.

"2d. The tracing of the proceeds, or a large proportion thereof, into the hands of the defendants (Story's Equity Juris. 1258).

"The actual amount upon which plaintiffs' lien has attached should, for greater certainty, be determined on a reference in which all the books of account should be produced for examination and the extent of defendants' liability ascertained.

"The objection raised as to the non-joinder of Mrs. Taylor as a party defendant ought not to defeat the plaintiffs' right to enforce a specific lien on the proceeds of the property over which Rouss & Bell ostensibly had the entire control.

"The liability of the plaintiffs was that of indemnitors for the firm of Rouss, Bell & Co., and the release of the property from attachment was also for the benefit of said firm. The agreement of Rouss & Bell with plaintiffs bound the firm (Story on Partnerships, secs. 102, 103), and so long a time having elapsed and no proof having been

Arnold v. Morris.

offered of Mrs. Taylor's disapproval of the agreement last mentioned, her ratification of it, under all the circumstances of the case, will be inferred.

As the plaintiffs have established an equitable lien on the proceeds of the property in dispute before the defendants took possession thereof, they are entitled to the benefit of the rule—*Qui prior in tempore, potior est jure*.

"The liability of Muser Bros. on their bond was, I think, fully established, and plaintiffs, as their indemnitors, were justified in repayment without suit.

"Judgment is therefore rendered in favor of the plaintiffs against the defendants, establishing a lien upon the proceeds of the property in question, and for a reference to ascertain the amount thereof."

Upon the coming in and confirmation of the referee's report, judgment for the plaintiffs for \$6,304 35 was entered and the defendant appealed.

Robert Ludlow Fowler, for appellants.

Douglass Campbell and George C. Lay, Jr., for respondents.

JOSEPH F. DALY, J.—[after stating the facts of the case as given above].—Upon these facts the learned judge, at special term, held that the promise of Rouss & Bell to plaintiffs to hold the stock attached in the Hoboken store, and additions to the stock, as security for plaintiffs against loss, by reason of their indemnifying the Musers for giving the undertaking to discharge the attachment, created a trust in favor of the latter, which they were entitled to enforce as a lien against the stock in the Hoboken store, and the goods with which the same was replenished, and by which they were entitled to the proceeds of the sale of such stock and goods in the hands of the assignees of Rouss, Bell & Co., viz.: the sum of \$5,110 51; and he gave judgment for that amount, with interest and costs.

The questions raised on the appeal are as to—1st. The agreement by which the trust was raised and the lien created,

Arnold v. Morris.

and the power of Rouss & Bell to act in that regard for their firm. 2d. The non-joinder of Mary Jane Taylor, the other partner, as a party to this action. 3d. The liability of the Musers to pay \$6,312 50 upon their undertaking, and the obligation of plaintiffs to repay the Musers that sum upon their bond of indemnity to the Musers. 4th. The right of plaintiffs to the proceeds of property with which the stock in the Hoboken store was replenished, from time to time, after the creation of the trust.

The promise of Rouss & Bell to plaintiffs, upon the faith of which the latter indemnified the Musers, was a verbal one. The plaintiff, Arnold, was the only witness called to sustain the issue, although he swore that his partner, Mr. Banning, the other plaintiff, Mr. Bull, their salesman, and Mr. Bell, defendant, were present. But if Banning was not called to corroborate Arnold as to the promise, Bell was not called to corroborate Rouss in his denial of it. The testimony of Banning would have been cumulative merely, and his non-production, as a witness, even though a coplaintiff, could not, as matter of law, raise any presumption against plaintiffs' case. The judge doubtless took it into consideration in determining the fact in issue, as a judge might, and defendant could ask no more; he did not in fact ask that. (*Bleecker v. Johnson*, Ct. Appeals, 4 N. Y. Weekly Digest, 402, reversing this court; 51 How. Pr. R. 380.)

The judge who tried the cause, in his opinion, printed in the case, gives very convincing grounds for believing that the promise was made, and a perusal of the whole evidence leaves the same conviction in my mind. And the agreement, as sworn to by Arnold, was sufficient to create the lien in plaintiffs' favor. Rouss said to plaintiffs that he had a stock of goods in Hoboken, which had been attached for a debt contracted by Weir, and he had been unable to find a resident of New Jersey to go on a bond to release the goods—any intimate friend of his—but that he had found a party who would do so if he could get some friend of his to indemnify the party. He desired the plaintiffs to become security against any loss by these residents of New Jersey.

Arnold v. Morris.

He said the goods attached were worth between \$10,000 and \$15,000; they were in first class order; that he was doing a nice business there; and that it interrupted his business very much; and he was anxious to have them released as soon as possible; that if plaintiffs would give the indemnity to the Musers, they might have the stock and goods as their own—if they wished, put one of their clerks or salesmen over there to take charge of it; that he would keep it replenished, and up to its present value at that time; and that they might put up their own sign; that he would hold the goods as indemnity for them or to secure them, or a word of like import. Upon this promise plaintiffs did as requested, became indemnitors of the Musers, who then executed the undertaking to release the goods, and defendants Rouss and Bell became bound accordingly to “keep the stock replenished to its then value,” and “hold it as indemnity” or security for plaintiffs, thus creating a valid trust for plaintiffs’ benefit, and giving plaintiffs a lien on the goods and a right to follow the property or its proceeds into the hands of a general assignee for their indemnity or security; the intention that the stock of goods should be plaintiffs’ security against loss on their bond being manifest and unmistakable (*Haggerty v. Palmer*, 6 John. Ch. R. 437; *Burn v. Carvalho*, 4 Mylne & Craig, 690–702; *Seymour v. The Canandaigua & N. F. R. R. Co.*, 25 Barb. 284; *Barry v. Ransom*, 12 N. Y. 462; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626).

But had Rouss and Bell, two of the firm of Rouss, Bell & Co., power to pledge the goods of the firm for this purpose? In all matters relating to the firm business they had general authority as partners to act for their firm. The goods seized by the sheriff were the property of the firm, and the object of having the Musers execute the undertaking in the attachment suit was to release the goods of the firm and enable it to carry on its business. This was an act done for the benefit of the firm wholly irrespective of the question as to whether the attachment was rightfully levied on those goods, and whether the action in which the attachment issued was against the firm or against Rouss and Bell indi-

Arnold v. Morris.

vidually, or against another copartnership formed by them and Weir. The release of the goods of Rouss, Bell & Co. was the business in hand, and to effect it plaintiffs were requested by two of that firm to indemnify the parties who, if so indemnified, were willing to give the necessary undertaking. In making the promise to plaintiffs, Rouss and Bell were acting for the firm of Rouss, Bell & Co., whose goods were wrongfully seized and whose business was suffering injury, and the benefit derived from the plaintiffs indemnifying the Musers was a benefit to Rouss, Bell & Co. The act of Rouss and Bell was not subversive of the objects of the copartnership, but to further its interest, and enable it to carry on its business, and was a direct benefit to the business. The consideration for such benefit was properly offered by that firm, and in creating a lien upon its goods for that purpose, the partners, Bell and Rouss, were not exceeding their authority, nor committing a fraud upon their copartner, nor using the copartnership property to secure their individual debts, although, as appellants contend, the attachment was issued against the copartnership property of John E. Weir & Co. (consisting of Rouss, Bell and Weir), and was wrongfully levied on the property of Rouss, Bell & Co. Mary Jane Taylor, the other member of the firm of Rouss, Bell & Co., being a secret partner, is bound by all the acts of the ostensible partners Rouss and Bell, to whom she committed the charge of the copartnership affairs; her consent in any other form is not necessary to be proved, nor (and this touches the next question raised on this appeal) is she a necessary party to any action affecting the copartnership property. Although the assignees of Rouss, Bell & Co. were trustees of an express trust, and are to turn over the surplus, if any, in their hands, after paying the debts, to the assignors as tenants in common of the surplus, it is merely a question for the assignees as to whether they will render such surplus, if any, to Rouss and Bell, the ostensible managing partners, who would hold it for themselves and as trustees for Mary Jane Taylor under the copartnership, or whether they would pay to the latter her share. But Rouss

Arnold v. Morris.

and Bell alone—who, as the active partners, managed the whole business for themselves and Mrs. Taylor, created the trust to plaintiffs and the trust to these assignees with Mrs. Taylor's consent—are necessary parties in all questions affecting the assignment of the copartnership property. As a secret or dormant partner she need not be joined as a defendant (*North v. Bloss*, 30 N. Y. 374).

The next question to be considered is as to the obligation of plaintiffs under their bond of indemnity to repay the Musers the sum of \$6,312 50, which the latter had paid out to the attaching creditors in New Jersey in satisfaction of their liability under their undertaking in the attachment suit. It is contended by defendants here that the Musers were liable for no more than the sum of \$1,065 13, the judgment of Falconer & Co., the plaintiff in the attachment suit, and were not bound to pay the judgments of other creditors, who, under the New Jersey statute, were admitted to the benefit of the attachment. There are three provisions of that statute for discharging attachments by giving undertakings. The 33d section provides: "That if the defendant appear to any attachment, he shall enter into bond with one or more sufficient sureties, being resident in this State, in case the attachment shall have been issued out of the Supreme Court, and in case the attachment shall have been issued out of the Circuit Court or Court of Common Pleas, then in the county in which such court shall be held, which bond shall be approved by the court, or a judge thereof, and shall be given to the sheriff of the county in case the attachment shall issue out of any Circuit Court or Court of Common Pleas, and to such sheriff as the court or judge shall direct in case the attachment shall issue out of the Supreme Court; which bond the sheriff is hereby required to take in his own name, in double the amount of the personal property attached, conditioned for the return of the goods and chattels, rights and credits, moneys and effects seized and taken by virtue of such writ of attachment, in case judgment shall be rendered for the plaintiff; and said sheriff shall, in case of a breach of such condition, on application of the plaintiff or any ap-

Arnold v. Morris.

plying creditor of the said debtor, assign the said bond, without fee or reward, to such person as the court shall direct, to be prosecuted for the benefit of the plaintiff and such creditors as shall have applied to the court or auditors under such attachment in conformity to this act."

The 37th section provides: "That if the said defendant, instead of giving any of the bonds before mentioned, shall make, execute, and file in the office of the clerk of the court out of which an attachment shall have issued, a bond with two or more sureties, to be approved by said court or a judge thereof, to the plaintiff in attachment, and a like bond to each of the creditors, who shall have applied as aforesaid, in double the sums respectively sworn to by them, conditioned for the payment of such moneys as may be adjudged to be due to them severally; and shall also enter his appearance to the suit of the said plaintiff and each of said creditors; then it shall be lawful for the said court or a judge thereof, either in term time or vacation, if it shall appear just so to do, to order the said attachment to be set aside, and that both the real and personal estate of the defendant be released and discharged from the lien thereof."

The 41st section provides that it shall be the duty of the officer by whom any writ of attachment shall be executed to deliver any property attached by virtue of such writ to the person in whose possession the same is found, upon the execution, in the presence of the officer, of a bond to the plaintiff by such person with one or more sufficient sureties in double the value of the property, conditioned that the defendant shall perform the judgment of the court in the action, or that the property or its value shall be forthcoming, and subject to the order of the court for the satisfaction of such judgment.

The undertaking executed by the Musers was under the last section, which does not, in terms, refer to applying creditors, nor provide for the enforcement of their judgments against the attached property, or the obligors in the undertaking. It was not shown on the trial that such a liability

Arnold v. Morris.

had ever been enforced against the sureties; but, on the other hand, it had not been denied, and the question is in doubt. Looking at the intention and spirit of the statute taken in connection with the other provisions of law on the subject, it does not seem difficult to reach a conclusion. The 41st section affords the defendant in attachment a more summary mode of relieving his property than those permitted in the 33d and 37th sections. Such an enactment in no wise warrants the supposition that the rights of applying creditors were to be cut off by it, and the property freed from their liens. This would render all the other provisions of the law practically useless, since the easiest form of proceeding by the debtor yielded him such greater benefit. The 41st section is not inconsistent with the provisions of law permitting other creditors to be admitted to the benefit of the attachment, and does not supersede it; it appears to me, in fact, to provide generally for their security. It will be seen that the undertaking executed by the Musers under that section (41) was conditioned that the defendant shall perform the judgment of the court in the action, or that the property or its value shall be forthcoming and subject to the order of the court for the satisfaction of such judgment. Under the provisions of the statute, other creditors of the defendants in that action applied in the action and recovered judgments in their favor. The aggregate of their judgments and that of Falconer & Co., the plaintiffs in the action, amounted to more than \$6,312 50. These together formed the "judgment in the action for the satisfaction" of which the Musers undertook that the attached property should be forthcoming. The applying creditors had no remedy except to file their affidavits of claim; issue was joined between each applying creditor and the defendants in attachment as well as between the latter and the plaintiffs in the attachment; those issues were tried together and judgments entered in favor of all the creditors. In case of default, one judgment would be entered up in favor of the plaintiff and all the applying creditors, and for their benefit. Here there

Arnold v. Morris.

were several judgments, but all in the same attachment proceeding, and there was really but one action, and, it follows, but one judgment, though in favor of different parties for different amounts. The obligation of the Musers to produce the attached property for the satisfaction of the judgment in the action would not have been performed by merely satisfying the judgment of Falconer & Co., the plaintiffs. The opinion expressed by the witness Gilbert Collins, Esq., an attorney and counsellor-at-law in the courts of New Jersey, and his reasons for his opinion, seem to me to be satisfactory, although the questions arising upon the facts are not free from doubt, as stated by Richard Wayne Parker, Esq., the other counsel examined on the point.

The next question is as to the proceeds of goods put in the Hoboken store after the creation of the trust in plaintiffs' favor, in order to replenish the stock and keep it up to its value at the time of such trust.

If the agreement between Rouss & Bell and plaintiffs were that the former might sell the goods then in the store pledged to plaintiffs, and substitute others for them, which might in time be sold and their place supplied, the plaintiffs' lien to open and shut, to let out and take in, and finally to attach to whatever might remain when the plaintiffs chose to enforce it, I should have little hesitation in holding the agreement invalid. No such fatal intention is to be assumed from the mere fact that the defendants (not the plaintiffs) spoke of keeping the stock "replenished" to its then value. An agreement to secure plaintiffs by a lien on stock which defendants might dispose of next day, or by a lien on goods that they might thereafter buy, would be no security, as it would give no lien. To give any meaning or force to the agreement we must construe it according to the positive promise "to hold the goods" for plaintiffs' indemnity or security, without considering the vague and unexplained addition as to replenishing the stock. If, therefore, Rouss, Bell & Co., holding the stock in trust for plaintiffs' security, without the latter's knowledge or consent, disposed of parts

Cushing v. Vanderbilt.

of it, and put in other stock to supply its place, the latter mingled with the former and became subject to the trust.

The judgment should be affirmed, with costs.

CHARLES P. DALY, Ch. J., concurred.

Judgment affirmed with costs.

THOMAS CUSHING, *against* PETER J. VANDERBILT.

[SPECIAL TERM.]

(Decided February 8th, 1878.)

Where, on appeal from a judgment of a District Court of the city of New York to this court, the appellant desires, in addition to a reversal of the judgment, the restitution of money collected from him under an execution on the judgment appealed from, he should apply at the time of arguing his appeal for restitution in case the judgment should be reversed, and in case he omits to do so, but succeeds in having the judgment reversed, he should apply for a reargument on that point.

Where the judgment of reversal is not a final determination of the rights of the parties, restitution of the money collected on the judgment reversed is not a matter of right, and on appeals from District Courts, in which there is no power in this court to order a new trial, but a new suit may be brought to which the judgment of reversal would not be a bar, the general term of this court which hears and decides the appeal is the proper branch of this court to decide the question of restitution, and the special term will not entertain the application.

MOTION by the defendant at special term to compel restitution by the plaintiff of moneys collected by him on an execution against the defendant on a judgment of the 7th District Court, which judgment was reversed on appeal by the general term of this court.

Matthew L. Harney, for the motion.

Wm. H. McDougall, opposed.

Hynes v. McDermott.

JOSEPH F. DALY, J.—Where the judgment of reversal is not final, it is not a matter of right to have restitution of moneys collected on the judgment reversed. (*Marvin v. The Brewster Iron M. Co.*, 56 N. Y. 671, and cases cited.) This is the rule in cases where the appellate court has power to order a new trial and does so. On appeal to the Court of Common Pleas from the District Courts of this city, there is no power to order a new trial; but the judgment of reversal, if not a final determination of the rights of the parties, is no bar to a new action by the respondent for the same cause. If the respondent have the right to begin a new action he would seem to occupy the same position as a plaintiff in courts of record, who is entitled by the judgment of reversal to a new trial; and the right of the appellant to restitution must be equally within the discretion of the appellate court. The question whether the judgment of reversal is final or not is for the general term which renders it to decide, and the appellant should apply at the time of arguing his appeal for restitution if the court decide to reverse the judgment against him. In case he omits to do so, but succeeds in having the judgment reversed, he should ask for a reargument on that point if entitled to it.

Motion denied with \$10 costs.

MARY ELIZA HYNES *et al.* against KATE McDERMOTT *et al.*

(Decided March 4th, 1878.)

The decisions upon the construction of §§ 390, 391 of the old Code of Procedure, as to what must be shown to sustain an order for the examination of an adverse party before trial, are not applicable to the construction of the provisions of § 870 *et seq.* of the new Code of Procedure upon the same subject.

Under the new Code of Procedure, a party applying for the examination of an adverse party before trial need not show such facts as would have sustained a bill for a discovery in equity, and the rules applicable to bills of discovery do not apply to such applications.

Hynes v. McDermott.

Where the applicant presents an affidavit setting forth the facts prescribed by § 872 of the new Code of Procedure, he is entitled to an order for the examination of the adverse party as a matter of right.

APPEAL from an order vacating an order for the examination before trial of the plaintiff Mary E. Hynes, on the part of the defendants Mary J. McCreery and Lavinia Gay.

The order for her examination was granted on an affidavit made by the attorney for the defendants desiring her examination, which, after stating the facts as to the parties to the action, their residences, and appearances by attorney, alleged as follows :—

“ II.—Deponent further says that the nature of the action is in ejectment; the substance of the cause of action is, that alleging themselves to be the widow and children of one William R. Hynes, deceased, the said plaintiffs claim that they are entitled to possession of certain real estate mentioned in the complaint in this action, situated in the city of New York; and the judgment demanded in the plaintiffs' complaint herein is for the possession of said property and *mesne* profits.

“ III.—That the defense in the action is, that the defendants Mary J. McCreery and Lavinia Gay are the sisters and sole heirs-at-law of the said the late William R. Hynes.

“ IV.—That the defendants desire to examine the plaintiff Mary Eliza Hynes, who resides at 217 West 34th street, in the city of New York, as a party to the action before trial. That the testimony of the said Mary Eliza Hynes is material and necessary for the defense of this action.

“ V.—That the said Mary Eliza Hynes, the person sought to be examined, is a party to the action.

“ VI.—That the said action is now pending, and the said Mary Eliza Hynes, the party sought to be examined, is of full age.

“ VII.—That the testimony of the said Mary Eliza Hynes is material and necessary for the defense of this action, for many reasons; the plaintiff claims to be the widow of William R. Hynes, deceased; the marriage, if any, was consummated in England; the late William R. Hynes and all the parties

Hynes v. McDermott.

plaintiff resided in England, and the defendants did not know of the existence of the said plaintiffs, or of the said the late William R. Hynes' connection with them, until after the death of the said the late William R. Hynes; and there are many facts, occurrences and circumstances which are within the knowledge of the said plaintiff, Mary Eliza Hynes, and which, in the nature of things, the defendants could not have any knowledge of, necessary and material for the defendants to inquire into for the purpose of properly preparing the defense in this action—many of them facts which they can learn from no other source. That deponent has only lately learned that the said Mary Eliza Hynes resided in the city of New York, and only within the last few days where she resided."

Upon the motion to vacate the order there was read an affidavit made by the guardian *ad litem* for the infant plaintiffs, in which, after stating the nature of the action, he swore:—

"That the only issue raised by the pleadings is whether the plaintiffs are the 'widow and children of said William R. Hynes.' That a commission herein has been issued on behalf of the plaintiffs, which has been executed and returned to the clerk of this court, under which the depositions of some twenty-two witnesses have been taken, by which depositions the plaintiffs prove the marriage ceremony between the plaintiff Mary E. Hynes and the late William R. Hynes, the birth of the two infant plaintiffs, and that the plaintiff Mary E. Hynes and said William R. Hynes, from the time of said ceremony to the time of his death, lived together as husband and wife.

"That the present application is an attempt at an 'inquisitorial examination' of the plaintiff Mrs. Hynes; and deponent further says that he verily believes that this application on behalf of the defendants is not made in good faith, but only for the purpose, if possible, of annoying and perplexing the plaintiff Mrs. Hynes, and for the purpose of ascertaining what witnesses and proofs the plaintiffs may be able to produce on the trial to support the claims of Mrs. Hynes and her children, and their cause of action."

Hynes v. McDermott.

The order was vacated on the ground that the decisions of this court in *Schepmoes v. Bousson* (1 Abb. New Cases, 481) and *Phoenix v. Dupuy* (*ante*, p. 238), were applicable to the provisions of the new Code, §§ 870–873 and 828, relating to the examination of an adverse party, and that under them the order should be vacated.

John Hallock Drake, for appellants.

Wm. H. Secor, for respondents.

VAN HOESSEN, J.—Upon the application of some of the defendants, Judge Van Brunt made an order, under sec. 872 of the Code of Civil Procedure, for the examination of Mary Eliza Hynes, one of the plaintiffs, as a party before trial. That order was vacated and set aside by Judge J. F. Daly, who held that the Code of Civil Procedure had not changed the law as it was established by sections 389, 390, 391 of the old Code of Procedure. An appeal was taken from the order of Judge J. F. Daly, and the question presented to us is, whether in order to procure the examination of the adverse party before trial, under sections 870 and 872 of the Code of Civil Procedure, the applicant must present to the court an affidavit embodying all, or the major part, of the allegations that were requisite and necessary in a bill of discovery?

It was held by the general term of this court in *Phoenix v. Dupuy* (*ante*, p. 238), and by the special term (Judge ROBINSON) in *Schepmoes v. Bousson* (53 How. Pr. 401), that sections 389, 390 and 391 of the Code of Procedure were a mere substitute for the bill of discovery in the old chancery practice; and that an examination of a party to an action could not be had by his adversary until the latter had shown by affidavit the very facts which the rules of equity pleading would have required him to state in a bill of discovery. Those decisions are binding upon the court, and I do not question them. The Court of Appeals alone can pass upon their correctness.

Hynes v. McDermott.

We have now before us a new statute, the provisions of which are very different from the language of the former Code. It cannot be truly said that sections 870 and 872 of the Code of Civil Procedure are a mere substitute for the bill of discovery. They are far more than that. They provide a simple plan of perpetuating testimony, and were intended, doubtless, as a substitute for art. 5, chap. 7, title 3, part 3, Revised Statutes (2 R. S. 398, 399). Those provisions of the Revised Statutes were intended to save to suitors the trouble and expense of filing a bill in equity to perpetuate testimony. It is not worth while to consume time and space by reciting what averments were necessary in a bill to perpetuate testimony. The text books (Barbour's Chancery Practice, vol. 2, marg. pp. 137-145, and Story's Equity Jurisprudence, vol. 2, §§ 1506-1512) are full upon that subject. I think it necessary to call attention to one matter, however, which will occasion trouble to those who believe that the rules relating to bills of discovery are still in force. "A bill to perpetuate testimony will lie in many cases where a bill of discovery would not lie. Thus, in cases involving a penalty or forfeiture of a public nature a bill of discovery would not lie at all. And in cases which involve forfeitures or penalties of a private nature it will not lie unless the party entitled to the benefit of the penalty or forfeiture waives it. But no such objection exists in regard to a bill to perpetuate testimony; for the latter will lie, not only in cases of a private penalty or forfeiture, without waiving it where it may be waived, as in cases of waste, or of the forfeiture of a lease, but also in cases of public penalties, such as for the forgery of a deed, or for a fraudulent loss at sea." (Story's Equity Jurisprudence, vol. 2, § 1509.)

There is a further distinction. A bill to perpetuate testimony will lie against a *bona fide* purchaser without notice, though a bill of discovery is not maintainable against him. (Story's Eq. Jur. vol. 2, § 1510.) Now, as sections 870 and 872 are a substitute for the bill to perpetuate testimony quite as much as for the bill of discovery, and as there is just as much authority for applying the doctrines as to the bill to per-

Hynes v. McDermott.

petuate testimony as there is for applying the doctrines relating to bills of discovery, I should like to know which of these two irreconcilable methods of procedure is to control the other. Furthermore, if it be right to insist that an affidavit of the party seeking to examine his adversary shall contain all the allegations of a bill of discovery, why ought it not also to contain all the allegations requisite in a bill to perpetuate testimony? Again, the language of sections 872 and 873 very distinctly prescribes what the affidavit shall state. It specifies what the affidavit shall *set forth*. It is to be observed that the section does not provide that the judge shall grant an order for the examination "when *it shall appear* by affidavit that sufficient grounds exist therefor." (See secs. 181, 220 and 229, Code of Procedure.) Where that language has been employed, the courts have uniformly construed it as giving them power to require a full and detailed statement of the facts by which it is made to appear that the applicant is entitled to the order he asks for. Section 873 declares that the judge must grant the order when an affidavit is presented to him *setting forth* certain allegations. The applicant is not bound "to make it appear" to the judge, that is, to convince him by a mass of evidence, positive, direct, or circumstantial, that those allegations are founded upon fact. The law requires the judge to take the applicant's word for them. Where an attachment is applied for, the plaintiff must show by affidavit *to the satisfaction of the judge* the facts entitling him to it (§ 636, Code Civil Procedure). Section 557, which relates to orders of arrest, and section 607, which relates to injunctions, are in substance the same as §§ 181 and 219 of the Code of Procedure, and were doubtless intended to be construed in the same way. It was established that affidavits setting out in detail the facts making an arrest or an injunction proper, would, in all cases, be required by the judge. But, as I have already pointed out, the language of §§ 872 and 873 is very different. The very change of words carries with it a strong presumption that the legislature did not intend that the same kind and the same amount of proof should be required as in an

application for a provisional remedy. In language so plain that it cannot be misunderstood, the Code prescribes what the affidavit shall contain, and I know of no authority except the law-making power which can lawfully require any additional allegations. (*Glenny v. Stedwell*, 64 N. Y. 128.)

I have already said that § 872 was a substitute for that portion of the Revised Statutes, entitled, "Of Proceedings to Perpetuate Testimony." The language of the Revised Statutes is not so clear and unmistakable as the language of § 872, and yet no one of the eminent judges who passed upon article five ever thought it necessary to tack to it the chancery rules relating to bills to perpetuate testimony. In *Jackson v. Perkins* (2 Wend. 308) the Supreme Court gave the statute a liberal construction. In *the Matter of Kip* (1 Paige, R. 601), the affidavit stated that certain actions of ejectment were pending, and that the testimony of Isaac L. Kip was material and necessary in the prosecution of the suits. There was no statement in the affidavit of any fact which made it necessary or proper for a court of equity to lend its aid, and, of course, as a bill to perpetuate testimony, the affidavit would have been fatally defective; but yet Chancellor Walworth seems to have had no doubt that the affidavit was sufficient. In his opinion the chancellor makes some observations which apply as completely to § 872 of the Code of Civil Procedure as they applied to the statute which the chancellor was expounding. He says: "By the act under which these proceedings were instituted, it was the intention of the legislature to give to the master or other officer power to take testimony, and to compel the witnesses to give evidence in the same cases and to the same extent that the court would be authorized to compel the witness to testify on the trial of the cause. It does not authorize the examination of a witness who would not be compelled to testify on the trial. The witness is not obliged to criminate himself, or answer any question which he would not be bound to answer if examined in open court. If the testimony is calculated to criminate the witness, render him infamous, or to subject him to a forfeiture or penalty, the officer has no

Hynes v. McDermott.

right to compel him to testify. So if the master is satisfied the testimony can have no possible bearing upon the questions which may arise in the cause, he ought not to compel the witness to answer; especially where a reasonable objection is urged by him. The officer must necessarily have some discretion on this subject, and *he may require the party on whose application the examination is made to explain the nature of the litigation so far as to enable him to judge whether such applicant is proceeding in good faith to perpetuate testimony, or is, under that pretence, only fishing for testimony to be used against the witness, or for other purposes.* On this subject the officer must be permitted to judge; and he is not bound to commit the witness for refusing to answer if he thinks the question ought not to be answered."

These observations prove conclusively that in proceedings under the statute which the chancellor was construing, fishing inquiries are to be stopped by the officer before whom the examination is going on, there being no authority for requiring an affidavit from the applicant specifying in detail the particular facts which it is sought to prove by the witness. (2 Tillinghast & Shearman Pr. 376; Tate's Pleadings, p. 82, sec. 62; Graham's Practice, 589; 2 Phillips on Evidence, 4th Am. ed., edited by Isaac Edwards.)

When the simplicity of our system of practice is considered, there seems to be no necessity for requiring in an affidavit the fulness of averment that was necessary in a bill of discovery. A bill of discovery required a written answer. If the defendant answered at all, he was compelled to answer all the facts stated in the bill, except where he was specially protected from answering. If he failed to answer, an injunction might be obtained restraining him from prosecuting, or from defending, the action at law; or the bill might be taken *pro confesso* against him, and then offered on the trial at law, as an admission on his part of all its allegations (Daniell's Chancery Practice); or he might be arrested and imprisoned until he answered. (Equity rule 18, U. S. Supreme Court.) Before any of these stringent proceedings should be taken, it was right to call upon the complainant to show the utility

and the necessity of the discovery which he sought. The answer was not made nor were the interrogatories propounded in the immediate presence of the judge, and there was, therefore, no way in which the defendant could be protected from a fishing inquiry save by the judge seeing to it, in the first instance, that the object of the complainant was legitimate, and that his interrogatories were so framed as to call forth only such information as he had a right to demand. In New York, however, the examination is had under the eye of the judge. If the judge performs his duty, a party cannot put a fishing question without being checked by the bench. (*Glenny v. Stedwell*, 64 N. Y. 123.) The party under examination may object to any question the same as upon a trial, and the objection may answer all the purposes of a demurrer to a bill of discovery. In short, in our practice the main, the interrogative, part of a bill of discovery, and the demurrer, plea or answer thereto, are not in writing but are oral, and are presented by the parties in open court. There is no need, therefore, of precautions against improper and fishing examinations. It is said that the examination of parties before trial tends to promote abuses. To that I can make no better answer than is found in the opinion of the Court of Appeals in *Glenny v. Stedwell* (64 N. Y. 123). "It is not a sound argument which reasons against the existence of a right from the possibility of the abuse of it."

It will be seen that the foregoing observations are not limited to the case under review. But even if I am in error in the views I have expressed, I think that the affidavit of Mr. Balestier is sufficient to sustain Judge Van Brunt's order. The plaintiff brought her action of ejectment. The defendants denied her right to the land in suit. The plaintiff alleged that she was the widow of the man from whom the defendants had inherited the property in controversy. The defendants had never heard that their brother, whose heirs they were, had ever been married. After issue joined, they sought to examine the plaintiff as a party before trial. If there ever was a case in which such an examination ought to have been had, it seems to me this is the very one. In what way were

Hynes v. McDermott.

they to discover when and where the plaintiff, of whose history they were utterly ignorant, and of whose existence they had just become aware, married their brother? How could they prepare for trial? What reason, except the extremely technical one given by Judge Daly in setting aside Judge Van Brunt's order, was there for preventing the examination of the plaintiff as to the issues raised by the pleadings? In Lord Hardwicke's time just such an examination could have been had in chancery; for in *Metcalf v. Hervey* (1 Vesey, Sen., 248) the great chancellor said: "The question comes to this, whether any person in possession of an estate as tenant, or otherwise, may not bring a bill to discover the title of a person bringing ejectment against him, to have it set out and seen;" and he was of opinion he might, to enable him to make a defense in ejectment. I am aware that that case has been frequently disapproved, but never, so far as I know, by the Court of Appeals. Again, § 872 embraces, as I have said, the equitable remedy of perpetuating testimony as well as the equitable remedy of a bill of discovery; and a bill to perpetuate testimony lay not only to obtain proof in support of the plaintiff's action, but also to obtain proof of matters of defense to repel it. (2 Story's Equity, § 1509, citing *Earl of Suffolk v. Green*, 1 Atk. 450.)

I think the defendants were entitled, therefore, to obtain the testimony of the plaintiff as a means of repelling her action. I am in favor of reversing the order of Judge Daly, with costs and disbursements.

LARREMORE, J.—Having concurred in the decision in *Phoenix v. Dupuy* (*ante*, p. 238), I have sought to apply the same ruling in this case. But a marked distinction is found in the phraseology of the statute authorizing an examination of a party before trial.

The case first mentioned was under §§ 389–395 of the old Code, the proceeding under which is in the nature of the former remedy by bill of discovery. (*Glenny v. Stedwell*, 64 N. Y. 120.)

Section 391 of the old Code provided that the examina-

Grafton v. Weeks.

tion of a party, instead of being had at the trial, might be had at any time before the trial at the option of the party. Under this statute, the examination has in some instances been held to be a statutory right and beyond judicial discretion.

But this application is under §§ 870-873 of the Code of Civil Procedure, which appear to be mandatory in terms, and to have been adopted to meet and remove a variance of opinion upon the construction of the former statute.

Whatever may be the effect of rule 89 of the Supreme Court, it was not in operation when this application was made, and the defendants stand upon the law in force in September, 1877.

It is unnecessary to consider what limitations might be imposed by the court upon such an examination. The defendants' right to the order for it seems to be authorized by law and a matter of right upon the papers presented.

CHARLES P. DALY, Ch. J., dissented on the ground that by Supreme Court rule 89 (Rules of 1877) the affidavit was required to specify the facts and circumstances showing that the examination was material and necessary, and that the affidavit in this case did not specify any such facts and circumstances.

Order reversed, with costs and disbursements.

JOSEPH GRAFTON *against* JAMES W. WEEKS, Administrator.
&c.

(Decided March 4th, 1878.)

A resident of a foreign State cannot be served with process for the commencement of an action against him personally, or as administrator or trustee, while attending in this State as a witness in a cause pending in a court of this State or one of the courts of the United States held therein.

Grafton v. Weeks.

So Held, where the person served with process was a resident of New Hampshire, and was served with a summons in an action in this court while attending in this State as a witness in a cause pending in the Circuit Court of the United States for the Southern District of New York.

APPEAL from an order made at special term denying a motion made by the defendant to set aside the summons in the action.

The motion was made on the affidavit of the defendant stating that he was a resident of Lancaster, Coos County, New Hampshire, where he had resided for the past thirty years; that he had been served with the summons in this action at No. 41 Chambers street, New York City, while he was actually in attendance as a witness on the part of the plaintiff in the suit of *Cummings v. Grafton*, then actually on trial in the United States District Court for the Southern District of New York; that at the date of the affidavit the cause was still on trial, and that he intended to start on his return to New Hampshire on that day; that he came into this State voluntarily, at the request of the plaintiff in the suit in the U. S. Court and his counsel, in good faith, for the sole purpose of being examined as a witness therein, and for no other purpose whatever.

In opposition to the motion there was read an affidavit stating that the service of the summons had not been made in any court room or during the session of the U. S. Circuit Court, or in the presence thereof, or while the same was sitting. Upon the hearing of the appeal there was also read by consent certain affidavits referred to in the opinion—those on the part of the plaintiff being for the purpose of showing that the defendant here had, by unfair devices, cut off the plaintiff's remedy against him in New Hampshire, and that he was interested in the verdict in the suit in the U. S. Court to the extent of two-thirds thereof. Affidavits in opposition to these were read on behalf of the defendant.

Thomas H. Hubbard, for appellant.

John M. Bowers, for respondent.

ROBINSON, J.—Defendant, while attending from the State of New Hampshire before the United States District Court for the Southern District of New York, in November, 1874, in an action then on trial, was served with a summons in the present action issued for and upon a money demand upon contract made by the intestate Joseph M. Thompson. Whatever may have been the variant decisions of the courts of record of this State in the exercise of their primary or original jurisdiction, it cannot be questioned by this court but that the Court of Appeals, in *Person v. Grier* (66 N. Y. 124), has established as a general principle of law that the resident of a foreign State cannot be served with process for the commencement of an action against him while attending in this as a witness before one of the courts held herein. The special consideration upon which the plaintiff seeks to sustain his right to enforce his action, notwithstanding such decision, is, that his claim is barred in New Hampshire by the Statute of Limitations of that State. As I understand the force and effect of the decision of the Court of Appeals, the privilege thus extended to one so attending as a witness is personal in exempting him from the jurisdiction of the foreign court, and I am unable to appreciate any distinction in this respect, whether the claim be one made against him in his private right, or as trustee, administrator, or executor, and without regard to the character of his defense. The matters presented in the additional affidavits read on this appeal, and which by consent are to be regarded in like manner as subjects of consideration after adverse decision as if heard on appeal, present no phase of equitable cognizance of the action not embraced within the general exposition of the law as announced by the Court of Appeals. *Fraud*, in avoidance of the just and equitable jurisdiction of a court of this State, would certainly be ground for questioning the general scope and terms of the decision of the Court of Appeals. But none such is shown in the present case upon the supplementary affidavits, and in consideration of the decision of that court the order appealed from should be reversed with costs. The order hereon being made in obedience to the decision of

Smith v. The American Institute of the City of New York.

the Court of Appeals, I do not deem myself possessed of any discretion, or at liberty to do otherwise than follow it.

CHARLES P. DALY, Ch. J., and JOSEPH F. DALY, J., concurred.

Order reversed with costs.

CYRENE SMITH, Respondent, *against* THE AMERICAN INSTITUTE OF THE CITY OF NEW YORK, Appellant.

(Decided March 4th, 1878.)

The plaintiff purchased from the defendant the right to exhibit at a fair held by it a certain article manufactured by her and known as an "abdominal supporter," and also the right to an allotment of space in the defendant's building for the purpose of such exhibition, such rights purchased by the plaintiff being subject to the condition of a right in the board of managers of the defendant to refuse admission to any one whom they might consider an improper person, and to remove the goods of such exhibitor, and also to exclude any article they might deem objectionable, and the plaintiff, in connection with the exhibition of her manufacture, exposed and circulated a circular in relation thereto—part of the circular being in capital letters—in which it was stated that the article was especially adapted "to the treatment of the various displacements of the uterus, and a relapsed state of the abdominal parts," and "for causing the womb and other organs to assume their natural positions," and that "ladies would find great comfort in wearing them before and after confinement," and that "in cases of pregnancy or very large abdomen No. 2 should be ordered," and that "they can be washed," and that orders should be "accompanied with measure around the largest part of the hips." When the character of this circular was brought to the attention of the board of managers of the defendant they directed its suppression, and notice of their action was given to the plaintiff, and she was notified that if she did not suppress the circular or modify it her privileges would be withdrawn, and her goods removed from the exhibition. After she had persistently refused to do either, and after the amount paid by her for her privilege of exhibition had been tendered her, she was excluded from admission as an exhibitor, and her goods removed from the exhibition. *Held*, that the character of the circular and the plaintiff's refusal to suppress or modify it justified such exclusion and removal under the conditions on which plaintiff purchased her privilege to exhibit. Per ROBINSON, J.

Smith v. The American Institute of the City of New York.

Under § 366 of the (old) Code of Procedure, regulating appeals to this court from the Marine and District Courts in the city of New York, which provides that "the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits," this court may reverse a judgment of the Marine Court on the ground that the damages were excessive, although no motion for a new trial was made in that court.

APPEAL by the defendant from a judgment of the Marine Court of the city of New York, entered upon a decision of the general term of that court, affirming a judgment entered on a verdict in favor of the plaintiff for \$145.

No motion for a new trial was made in the court below.
The facts are fully stated in the opinion.

Malcolm Campbell, for appellant.

E. D. Culver, for respondent.

ROBINSON, J.—Plaintiff, in consideration of seven dollars paid by her, obtained from the defendants the license, with the privilege of space in their exhibition building during the period of their fair in the fall of 1875, for the exhibition of her invention, styled an "abdominal supporter," subject to the conditions, that the board of managers reserved the right to refuse admission to any exhibitor whom they *might consider an improper person*, and also to remove the goods of such exhibitor; also to exclude any article they might deem objectionable. She was accordingly assigned a place for exhibition of her wares, and placed on exhibition an "abdominal supporter," an article of her own invention, which in itself could scarcely offend the most fastidious, as it presented, only in a somewhat modified form, the features of an ordinary *female corset*. She, however, had prepared for the exhibition a *circular*, designed to afford full information to females requiring treatment for abdominal ailments, which she placed in exposed situations at the fair so that they were accessible, and their inspection was invited from every man, woman and child attending the exhibition. This circular assumed to disclose, and in some extent in *capital letters*, with prominent significance,

Smith v. The American Institute of the City of New York.

the merits of the abdominal supporter, as adapted especially "*to the treatment of the various displacements of the uterus and a relapsed state of the abdominal parts ;*" "for causing the womb and other organs to assume their natural positions ;" and that "*ladies would find great comfort in wearing them before and after confinement ;*" and that "*in cases of pregnancy or very large abdomen No. 2 should be ordered ;*" that "*they can be washed ;*" and that orders should be "*accompanied with measure around the largest part of the hips.*"

The mind of any one who could recognize this circular as proper for general distribution among young men, women and children, or persons possessed of ordinary delicacy, must be so peculiarly constituted as to accept with complacency, and as fit for general presentation, such exhibitions as are made in what are called "*anatomical museums,*" illustrating the grossest and most offensive forms of human disease.

Considering the character of the exhibition as one intended for all classes of persons, young and old, the circular was, in my opinion, not only indelicate, but indecent.

Who could, in accompanying friends, male or female, recognize such a circular but with a blush or constraint ; or who would be willing to have such details of matters of private physical concern displayed to his young children, or pressed upon the attention of the friends, male or female, whom he was accompanying at the fair, and to whose unalloyed gratification he desired to administer ?

The plaintiff, if justified in this case, might, with like propriety, have freely dilated as well upon the remote and intricate causes promoting "*prolapsus uteri*" as upon all other ailments of the womb and other organs her invention was designed to remedy, and also upon the whole *arcana* of the mysteries of midwifery, or ailments peculiar to females. It is but common decency which demands that, except when necessity requires their disclosure, all such details should be concealed, and the minds of the common throng of humanity guarded from their contemplation. Immediate suppression by all lawful means, considering the character of

the circular, a distribution of which the plaintiff insisted upon making, and by all her power endeavored to promote, would seem to any one not interested in effecting the sale of her wares, or, as she states it, one having "to battle round to support herself," a matter of manifest propriety and necessity. When the character of this circular was brought to the attention of the directors of the Institute they directed its suppression. Notice of such action was given to the plaintiff, and she was told that if she did not suppress the circular, or modify it, her privileges would be withdrawn and her goods removed from the exhibition. She said she should circulate that circular, and defied them to remove the case containing her wares. After her persistent refusal, and after the money she had paid for her privilege had been re-tendered, her passes were recalled and her goods removed from the exhibition. In this the defendants, in my opinion, were fully justifiable, and they would have acted reprehensibly if they had not done as they did. The plaintiff by her conduct, and within the terms of the contract or license admitting her and her goods on exhibition, had become one justly imputable with the charge of being an *improper person*, whose action affected the good order and *proper* conduct of the exhibition, and who might be excluded for that reason, within the terms of her admission as an exhibitor.

But secondly, in the review on appeal of the judgments of the District and Marine Courts of this city, this court is not confined to mere questions arising upon strict exceptions taken on the trial, but are "to give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits." (Code, sec. 366; *Hazard v. Conklin*, G. T. Nov. '76. MSS. p. 14.)

The damages awarded the plaintiff, even if there was any breach of contract on their part, were excessive. It is impossible to analyze the verdict of the jury and determine what items entered into it. The cost of the circulars was allowed to be presented to the jury as an element of damage. They were for general use in representing the merits of the article,

Smith v. The American Institute of the City of New York.

and nothing was shown from which it could be deduced that they did not, for that purpose, continue of the value of their cost, or how such value was impaired by her exclusion from the exhibition. She was allowed to show the value of two supporters "gone," without any proof establishing their conversion. She had the benefit of the exhibition for three weeks, and yet was allowed to prove the value of her time in getting ready for and attending the exhibition at \$4 a day; also, the cost of getting ready for the fair, estimated at \$100, including her preliminary preparations; also, for *extra* work on seven supporters for the exhibition \$10 each, and loss on cost of show cases \$25, between what she paid for them and what she realized on subsequent sale. Even if the defendant wrongfully withdrew her license there was no proof in the case aside from the loss of goods, which the judge excluded from the jury, that her damages in preparing the articles for exhibition and extra labor thereon; the procuring of the show case; the expense of transportation of the articles from her domicile to the exhibition; the expense of the circulars for the exhibition and her loss of time, amounted to any such sum as \$145. The judge also erred in allowing these considerations to be submitted to the jury as elements of damages. Also, in charging that the right reserved to exclude must be exercised within a *reasonable time*. On the contrary, such right was expressly reserved during the exhibition. So, too, the charge of the judge in failing to distinguish between the contract to allow an exhibition of the *article* and the assumption by the plaintiff of a right to issue the *circular* could not but have confused the jury, and led to the erroneous result.

In my opinion, the plaintiff, by her own conduct, deprived herself of all benefits of her contract to be allowed to continue as an exhibitor, and she and her goods were, under the circumstances, rightfully ejected. Moreover, in any aspect of the case the judge allowed improper testimony as to damages.

The judgment in her favor should therefore be reversed and a new trial ordered, with costs to abide the event.

James v. Burchell.

LARREMORE, J.—I concur on the ground that the damages are too remote as to most of the items proved.

Judgment reversed and new trial ordered, with costs to abide the event.

EDWARD D. JAMES *et al.* Appellants, *against* JOHN J. BURCHELL, Respondent.

(Decided March 4th, 1878.)

Where the plaintiff covenanted that she was seized in fee simple in her own right of certain land, and would convey the same to the defendant, free and clear of all incumbrances, and by a deed with full covenants, and the defendant by the same instrument covenanted to purchase the land at a fixed price, and to erect certain buildings thereon,—*Held*, that these covenants were mutual and dependent, and that the plaintiff having deeded the land to a third person, this was such a breach of the covenants on her part as justified the defendant in refusing to perform those on his part.

APPEAL by the plaintiff from a judgment of this court dismissing the complaint, entered on the decision of Judge VAN BRUNT, after a trial before him at spécial term.

The facts are fully stated in the opinion.

E. H. Benn, for appellants.

Flanagan & Bright, for respondent.

LARREMORE, J.—The parties to this action made an executory contract, dated January 10th, and acknowledged January 11th, 1871, for the purchase and sale of four lots of land in the city of New York, by which the plaintiffs, in consideration of \$1, agreed to sell and convey, or cause to be conveyed, as thereafter stated, to the defendant, the land in question, for the sum of \$44,000, or \$11,000 for each lot. It was further covenanted and agreed by the parties

James v. Burchell.

that the defendant should commence the erection of four houses upon the lots on or before February 10th, 1871, and complete the same within seven months from that date; the plaintiffs to advance \$4,000 on each house, to aid in its erection, and upon being paid and reimbursed the price of said lots and advances thereon, either in cash or the bonds of the defendant, secured by mortgages on the premises, then the plaintiffs agreed to convey or cause to be conveyed the same to the defendant in fee by a full covenant, warranty deed, free from all reasonable objections, except such incumbrances as should be made, or caused or suffered to be made, by the defendant, who agreed to complete the contract on his part within eight months from its date. The plaintiffs covenanted that Sarah James was seized in her own right of a good title to said premises in fee simple. It was also agreed that the plaintiffs, at their election, might mortgage each of said lots to the amount of \$15,000, and convey the same subject to said mortgages in lieu of purchase money for the same amount.

On the same day on which the contract was acknowledged—February 11th, 1871—the plaintiffs conveyed the premises to one Isaac B. Findull, by a deed without full covenants of warranty. Subsequently, objections were raised as to the validity of Mrs. James' title to the premises, and the defendant declined to go on with the contract.

This action was brought to annul the contract, and to recover damages for its breach. The complaint was dismissed on the trial, and from the judgment entered thereon this appeal is taken.

The findings of fact were as follows:

1st. That the contract was made January 11th, 1871.

2d. That on the same day the plaintiffs conveyed the premises by warranty deed without covenants to Isaac B. Findull, subject to no incumbrance whatever.

3d. That the defendant never entered into possession of the premises, but refused to erect the buildings because the plaintiffs could give no valid title to the property. And the learned judge who tried the cause held as a conclusion of law

James v. Burchell.

upon the facts thus found that the plaintiffs' violation of the covenants released the defendant from all obligation to perform the contract.

There is no controversy as to the fact of the execution of the contract, and as it was acknowledged on January 11th the presumption is strong that it was not delivered prior to the date when the deed to Findull was acknowledged, which deed was recorded January 12th, 1871.

To rebut this presumption, James testified, "We delivered that deed to Findull the day after we made and executed this contract with Burchell," that Findull knew of it and saw it when he took the deed. The counsel for appellants attached great importance to the fact that the trial judge found, as questions of fact, that the contract and deed were delivered on the same day, and that defendant refused to erect the buildings because the plaintiffs could give no title to the premises, and that the judge in his opinion held that the defendant was not bound to complete the contract "after the plaintiffs had conveyed the premises to a stranger by an absolute deed," and that his refusal to find as requested was error.

This court held, in *Quincey v. Young* (5 Daly, 44), that a judge or referee was not bound to make findings upon every fact proved in a case, but only upon such facts as were material and necessary to support the judgment rendered. In an equity cause it is competent for a court of review to render judgment upon admitted facts, although no findings thereon have been made as requested. It was decided in *Tompkins v. Lee* (59 N. Y. 662), that where the findings of fact settled by a referee are in conflict with his report, the former will be assumed to be correct and the latter will be disregarded. The opinion of the judge cannot overthrow the judgment if the facts proved are sufficient to sustain it. The fact of the conveyance of the property is unquestioned, and the contract is now before us for construction.

If the deed to Findull was a violation of the contract by the plaintiffs, it matters little whether it was delivered prior or subsequent to the execution and delivery of the contract.

James v. Burchell.

That it was delivered prior to the time when the defendant was to commence the erection of the buildings (February 10th, 1871) is not disputed.

The question of defendant's possession and occupation of the premises was decided upon conflicting testimony, which was not of so loose or uncertain a character as to be insufficient to sustain the judgment on appeal.

Let us next consider whether defendant was justified in refusing to erect the buildings on the ground that plaintiffs could give no title to the premises within the contemplation of the contract, and whether their violation of its covenants released him from all obligation thereunder. This necessarily leads to a construction of the contract.

The defendant agreed to expend the sum of \$60,000 in the erection of buildings, and was not to receive his deed until the buildings were completed. It is not unreasonable to assume that in view of so large an outlay of money on the bare security of an executory contract the defendant should have relied somewhat on the personal character and responsibility of the parties with whom he dealt. There was to be no incumbrance but such as he should allow, except that the plaintiffs might mortgage each lot for \$15,000, and convey the same subject to said mortgage in lieu of purchase money for the same amount. Mrs. James' covenant of seizin in her own right of a good title to the premises in fee simple was the inducement to the defendant's covenant to expend \$60,000 on the property before the delivery of the deed. Such an expenditure should not be regarded as an ordinary payment on account of the purchase money, in view of the peculiar nature of this contract, whose covenants were manifestly intended and should be held to be mutual and dependent. (*Judson v. Wass*, 11 Johns. 525; *Tucker v. Woods*, 12 Johns. 190; *Robb v. Montgomery*, 20 Johns. 15.) The conveyance by the plaintiffs and the execution of the mortgages by the defendants were to have been simultaneous acts. This fact, taken in connection with the covenant of an existing capacity in Mrs. James to convey with warranty, would seem to indicate that the decision of the learned judge at special

James v. Burchell.

term has expressed the original intention of the parties to the contract.

It appears by James' note of March 17, 1871, that objections had been made to the title of the premises, and that he intended taking measures to remove them. In view of this, and also of the fact that said premises had been previously conveyed in fee to a former clerk of James without any consideration, and held by him in trust for Mrs. James, defendant's distrust of the good faith of the transaction was neither unreasonable nor unwarranted. With the title to premises of questionable validity in the hands of an unknown and apparently irresponsible person, the defendant was right in refusing performance of the contract on his part, unless he had some assurance that it would be consummated in accordance with its terms. To my mind the conveyance by James and wife to Findull, and the reconveyance by him, were meaningless acts, unless intended to operate to the prejudice of the defendant. The part of the contract which bound plaintiff to convey, or cause to be conveyed, as thereafter stated, must be construed in the light of the whole instrument and all the surrounding circumstances. It may have been intended to provide for a conveyance by an attorney in fact. The clause "or cause to be conveyed as thereafter stated" may be construed to mean the conveyance by warranty as thereafter provided. But taken altogether the evidence shows no intention or agreement on the part of the defendant to accept any other warranty than the plaintiffs', or to release them in any way from the fulfilment of their covenants.

There are no substantial errors shown by the record, and the judgment appealed from should be affirmed.

CHARLES P. DALY, Ch. J., and ROBINSON, J., concurred.

Judgment affirmed.

Helm v. The Metropolitan Life Insurance Co.

HENRY HEIM, Appellant, *against* THE METROPOLITAN LIFE
INSURANCE COMPANY, Respondents.

(Decided March 4th, 1878.)

Where the plaintiff, being in arrears for premiums due on his policy of insurance with the defendant company, surrendered his policy and received a "paid-up policy," and at the same time gave an interest-bearing note for the past due and unpaid premiums on his old policy, which note was made a lien upon the paid-up policy, and it was also made a condition of the contract for the surrender of the old and the issuing of the new policy that if the interest or any part of the principal of his note was not paid when due, that then the policy should become void without notice,—*Held*, that the plaintiff was not entitled to notice of the time when the interest on the note fell due (even though it was the continuous practice of the company to give notice in such cases), and that his failure to pay the interest when due worked a forfeiture of the policy, against which a court of equity would not give relief.

Held, further, that the fact that the plaintiff supposed that the policy, being called a "paid-up policy," required no further payments to keep it in force, was no ground for relieving him, no fraud or mutual mistake being shown.

APPEAL by the plaintiff from a judgment of this court dismissing the complaint, entered on a decision made by Judge LARREMORE, after a trial before him at special term.

The facts are fully stated in the opinion.

Henry Wehle & Simon Sultan, for appellant.

Wm. Henry Arnoux, for respondent.

ROBINSON, J.—Plaintiff, in August, 1868, procured from defendants an insurance for \$1,000 upon his life for the period of ten years at an annual premium of \$110 05, to be paid in quarterly instalments, and continued to make such payments in cash or by notes until on or about August 26th, 1874, when he offered his policy for sale to them; but not satisfied with the price they were willing to pay, agreed with them to surrender that policy and to take one out of a different character, founded upon the consideration of a sur-

Heim v. The Metropolitan Life Insurance Co.

render of that policy, the acceptance of the conditions mentioned in a surrender receipt, which he signed, and the annual payment of \$12 26 as interest due and to accrue on \$175 15, the amount of premium notes and policy loans then due from him on account of the previous policy, which interest was to be paid annually (in advance) on the 26th day of August thereafter; that then payable being advanced by him on receipt of the new policy which insured his life in the sum of six hundred dollars, payable in ninety days after the 26th of August, 1878, less the amount of all unpaid notes given for loans on the new and prior policy, and all deferred premiums, if any, then existing. The policy was subject to the condition, among others, that said interest should be paid on or before the day above mentioned for the payment thereof, at the office of the company or their duly authorized agent, producing receipts signed by the president and secretary, and any default thereof, or failure to pay any note given for interest or other obligation upon the policy, should cause the policy to be void, *without notice*, and all payments thereon forfeited. Plaintiff at the same time signed an agreement that said sum of \$175 15 was a loan at interest and a proper lien upon said policy, which was accepted, subject as well to the conditions thereof as to the conditions that the amount of said loan should be a set-off or counter claim to any amount which might become due upon said new policy, and that the company might deduct the same therefrom, as also that for failure to pay said interest on said loan (in advance) on the 26th day of August, during the life of said policy. The plaintiff also agreed, in an instrument signed by him, that failure to so pay said interest should cause said policy to cease and determine. Plaintiff failed to pay the sum of \$12 26 interest money payable by these contracts on the 26th of August, 1875, and gave no attention to the matter until the 21st of August, 1876, when he offered the company that sum, which they refused.

The plaintiff alleged, and it was admitted, that he was a German, but he did not show, as he alleged, but it was denied, that he was unable to speak or understand English,

Heim v. The Metropolitan Life Insurance Co.

although examined through an interpreter. He claims to be relieved from the forfeiture resulting from his default in paying the instalment of interest or premium due on the new contract on the 26th August, 1875, because, as he alleges, he understood it was a paid-up policy and did not look at his policy, and because, as he alleges, when he made payments under the previous policy he always received notice.

It was also offered on his behalf to show that it was the continuous practice of the company to give notice that payment was required. He showed no offer to pay the interest due August 26th, 1876, except by that made in his complaint; and it is upon such a case the plaintiff seeks to be reinstated in his rights as they existed on the 25th of August, 1875, before he had made any default.

In *Roehner v. Knickerbocker Life Ins. Co.* (4 Daly, 512) this court held, at general term, that when the insurance company had taken in part payment a note payable at four months for annual payments that had become due on such a policy, which contained a similar clause of forfeiture as was in that in question in the present case, no demand of payment was necessary, and the note being unpaid, all the rights of the person assured under the policy were forfeited and the policy became void, citing *Baker v. Union Life Ins. Co.* (43 N. Y. 283) and *Pitt v. Berkshire Ins. Co.* (100 Mass. 500), in which the same doctrine was held. The new policy issued to this plaintiff did not make the principal debt, due on the premium and policy notes that had been given during the running of the one surrendered, any condition to its validity, but only required the annual payment of \$12 26, the interest on that debt, to be paid annually, and although the new policy was also pledged for payment of that debt, the pledge and any money to become due under it ceased to be of any value if, prior to the insurance money becoming due, the policy became forfeited. The plaintiff's condition as a debtor owing said principal sum was not changed or relieved unless he made such payment of the annual interest in such way as to secure his rights under the new policy. His default rendered the security void and of no effect. As

Heim v. The Metropolitan Life Insurance Co.

all prior negotiations and contracts relating to his life insurance were merged in the new policy, and all prior practices of the defendants inconsistent with its express terms were ignored (*Ruse v. Mut. Ben. Life Ins. Co.*, 23 N. Y. 516), no obligation or duty rested on the defendants to give him notice of the accruing payment when it was expressly agreed by him that the premium should be payable according to its terms "without notice." Nothing had *thereafter* occurred with him from which any waiver or right to an indulgence could be inferred or suggested. (*Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276; *Homer v. Guardian Mut. Life Ins. Co.*, 4 N. Y. Weekly Dig. 106.) His ignorance or want of intelligence as to the character of the agreement he had entered into, or supposition that it was an entirely "paid-up policy," furnishes no ground for equitable relief. No such previous ignorance and want of ordinary precaution in business transactions can make a case in his favor. No case of mutual mistake is suggested as ground for reforming the contract, nor any imputation of fraud made against the defendants. The inequitable character of any such restoration of an assured who is so in default, is exemplified (outside of the war question) in the opinion of the Supreme Court in *The New York Ins. Co. v. Statham* (93 U. S. Rep. [3 Otto,] 24; S. C. in equity [MSS.] decision, Oct. term, 1877); *Worthington v. Charter Oak Ins. Co.* (41 Conn. 411-413.)

For these reasons the complaint was properly dismissed, and the judgment should be affirmed.

CHARLES P. DALY, Ch. J., and JOSEPH F. DALY, J., concurred.

Judgment affirmed.

Dilleber v. The Knickerbocker Life Insurance Co.

DEBORAH B. DILLEBER, Respondent, *against* THE KNICKERBOCKER LIFE INSURANCE COMPANY, Appellant.

(Decided March 4th, 1878.)

Where the insured, being about to give up a policy of insurance upon his own life, was told by the defendant's president that if he would keep it alive and could not make payment when due that the company would give him whatever accommodation was necessary, and the insured thereupon abandoned his intention of giving up his policy, and for seven years thereafter the defendant received the premiums after they were due,

Held, 1. That although the policy provided that it should continue in force only so long as the annual premiums were paid when due, yet this was a condition that might be waived by parol.

2. That the authority of the president to waive such condition would be inferred in the absence of any evidence to the contrary.

3. That the receipt by the company for seven years of the premiums after the day on which they were due, and when the company might have enforced a forfeiture, was an approval and ratification of the act of the president in waiving such condition.

EXCEPTIONS ordered to be heard in the first instance at general term.

The action was brought to recover the amount payable on a life insurance policy on the death of John R. Dilleber, issued by the defendant.

The policy was dated Dec. 22d, 1858, and made for one year, and provided that it might be continued in force from time to time until the decease of the said John R. Dilleber, provided the insured should duly pay on or before Dec. 22d in each year the annual premium. The premium for 1875 had not been paid at maturity, but had been tendered two days afterwards and refused.

The plaintiff claimed that the defendant, after the policy had been made, had made an agreement by which the payment of the premiums on the day when they fell due was not to be enforced, but a reasonable time thereafter given for their payment.

The evidence by which it was claimed such fact was established is stated in the opinion.

Dilleber v. The Knickerbocker Life Insurance Co.

Horace E. Deming, for appellant.

Fred. H. Kellogg, for respondent.

CHARLES P. DALY, Chief Justice.—I cannot agree that the verbal agreement entered into by Dilleber with the president of the company in 1860 had no application to the payment of future premiums, but was limited to an adjustment of the premium then due by taking his note for it, payable at a future day with the accruing interest.

Dilleber notified the general agent of the company then that he wished to give up his policy, and the agent brought him to the president, when one or both of them said, "You cannot. You must not give up the policy. You must keep it alive. If you can't pay it *when it becomes due we will give you whatever accommodation is necessary*," and the note was then given for the premium that was overdue. The witness further says that Dilleber gave the note, and that "finally they agreed, *by having accommodations*, to keep it alive and carry it along," and that, he says, "is the way it was fixed." Having accommodations, that is, keeping it alive by having accommodations, certainly means something more than simply accommodating him in respect to the premium that was then overdue, and that the company so understood it appears in the fact that thereafter he was so accommodated by the company's receiving the premium in the years 1862, 1863, 1864, 1865, 1868, 1869 and 1870—in each of these years after it was due. In 1867 it was paid before it was due, and in 1871, 1872, 1873 and 1874, on the day it was due. Nor is it inferable that because each of the receipts given for these premiums contained a clause that the omission to pay the premiums when due should cause the policy to be void without notice that these receipts put an end to the previous agreement of both parties that he should have accommodations to carry the policy along and keep it alive, as during a period of eight years thereafter the premiums, with the exception of one year, were regularly received after they were due, when the company, if the understanding was that

Dilleber v. The Knickerbocker Life Insurance Co.

he was not to be accommodated in respect to future premiums, had the right to forfeit the policy.

The plain meaning of the agreement, as I understand it, is, that the company would not, in his case, insist thereafter upon the strict condition that the policy should become void if the premium was not paid on or before the precise day, but he was to be accommodated by allowing him a reasonable time after that day; and in the payments of the premiums overdue during the seven years referred to the time was not greatly extended, the average being about four days after;—the time varying from one to nine days after the day named in the policy.

An agreement by parol to give the insured a reasonable time after the day fixed by the policy for the payment of the premium, entered into two years after the policy was effected, and the inducement to which on the part of the company was, that the insured would not, as he then wished to do, give up the policy, but would, in the language of the witness, carry it along and keep it alive, was a valid agreement which qualified the strict condition in the existing policy; and after entering into such an agreement the company are estopped from enforcing the forfeiture if the premium is tendered within a reasonable time after the day, which was the case here: for the amount of the premium in 1875 was offered to the company two days after the day named in the policy. (*Howell v. The Knickerbocker Life Ins. Co.*, 44 N. Y. 276; *Homer v. Guardian Life Ins. Co.*, 67 N. Y. 478.) The authority of the president to make such an agreement on behalf of the company will be inferred in the absence of any evidence to the contrary (*Conover v. The Mutual Life Ins. Co.*, 1 Comst. 290; *Bodine v. The Exchange Fire Ins. Co.*, 51 N. Y. 117), and the receipt of the premiums for so many years by the company after the day named in the policy, was an approval and ratification by the company of the act of the president. (*Block v. The Columbian Ins. Co.*, 42 N. Y. 393; *Dean v. The Aetna Life Ins. Co.*, 62 id. 642.)

The company refused to receive the premium in 1875 after the day, unless upon an examination by their regular

Dilleber v. The Knickerbocker Life Insurance Co.

physician he should prove to be an insurable subject, which was either treating the policy as forfeited or seeking then to impose a condition which was not in the agreement made between him and the company in 1860. It would be gross injustice if the chief officer of the company should be allowed to hold out the assurance that the party, if he would continue the policy, should not be held thereafter strictly to the payment of the premium on the day named, and then after fourteen years, during which the premium was received when offered, whether before, at, or in a few days after the time, that the company should be allowed to forfeit it because the offer of payment was two days over the time. But for the assurance given to him it may be assumed that Dilleber would not have allowed a policy upon which he had been paying the premium for sixteen years to become forfeited by a failure to pay on or before the day named, but would have paid it, on that day or before, as he had done during the four years preceding; and for the law to hold under such circumstances that the policy is forfeited, would, as I have said, be to sanction a gross injustice. The law goes very far, as it must do, in sustaining the skillfully drawn conditions which insurance companies are careful to incorporate in their policies; but in a case like this, where the president of the company gives the assured to understand that if he will continue the policy and cannot pay the premium as it becomes due the company would give him whatever accommodation was necessary, and he acts upon this assurance, the company should be bound by the acts of their officer, or such contracts, instead of being of the beneficent character they are claimed to be, would be but a trap for the unwary. No person would be justified who had taken out a policy in acting in respect to the payment of premiums upon any assurance made to him by any officers of the company. I think the judgment was right and should be affirmed.

JOSEPH F. DALY, J., concurred.

ROBINSON, J., dissented.

Judgment affirmed,

Curnen v. The Mayor, &c., of the City of New York.

ANNIE T. CURNEN, Appellant, *against* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK
et. al. Respondents.

(Decided March 4th, 1878.)

Where, by a mistake, the amount of an assessment is paid to the collector of arrears of assessments in New York City, and an entry made on his books to the effect that the assessment on a certain lot is paid, this does not discharge the lien of the assessment nor prevent it (after the mistake has been rectified and the money refunded) from being enforced even against the property in the hands of a person who purchased it upon the faith of such entry.

The only way in which a purchaser of real estate can protect himself from the liens of assessment is that provided by the act of 1853 (L. 1853, c. 579, § 16), by which the certificate of the clerk of arrears, countersigned by the comptroller, is made conclusive evidence. Such certificate was intended by the legislature to be, and is, the only entry or declaration made by the officers of the corporation of the city of New York in relation to such matter which will operate as an estoppel upon it.

APPEAL from a judgment of this court, entered upon the report of George Ticknor Curtis, Esq., referee, to whom it had been referred to hear and determine the issues.

The action was brought against the mayor, &c., of New York City and Frederick and Theodore Killian, to restrain the corporation from selling the plaintiff's land for the payment of certain assessments therein; to vacate and set aside a certain decree in a suit by the Killians against the corporation, and to have certain assessments on the plaintiff's land cancelled and discharged of record. The corporation only appeared in the action.

The facts are fully stated in the opinion.

W. H. McDougall, for appellant.

D. J. Dean, for respondent.

ROBINSON, J.—In July and August, 1872, two assessments

Curnen v. The Mayor, &c., of the City of New York.

were imposed upon premises designated as lot No. 50, in block 101 on assessment maps, on No. 340 West 55th street in this city, one for \$148 for the widening of Broadway and the other for \$7 20 for the opening of Riverside Park, which, having been duly confirmed by the Board of Revision and Correction of Assessments, had become a lien or charge on said lot.

In March, 1873, Killian Brothers (Frederick and Theodore), intending to pay liens on adjacent property belonging to them, by mistake paid these assessments on No. 340 West 55th street to the collector of arrears of assessments, upon some misinformation from a clerk in the office of the said collector, and thereupon an entry was made in reference to and opposite to the entries of said assessments of the words "paid by Killian Bros." In November, 1873, the plaintiff became the purchaser of this property, and preparatory thereto caused a search to be made by a searcher, Mr. P. C. Kingsland, for arrears of assessments upon the property, who, finding the said entries made opposite said assessments in the books of the collector of assessments reported to plaintiff that the property was free from other liens, by way of taxes and assessments other than such as were designated by him, not including either of those in question.

Whereupon plaintiff purchased the property and paid the full consideration money without any regard to these assessments. In 1876 the Killian Brothers instituted an action against the defendant to recover the sums they had so paid by mistake, and obtained judgment therefor; and by virtue of the judgment in that action and special directions contained therein, an entry was made in the said books of the said collector opposite the statement therein of these assessments, "lien restored."

Were these transactions between *private parties* some considerations might possibly be invoked or urged which are not due to them under the circumstances of the present case. They were not matters of private concern. The corporation of this city in the opening of public streets are acting "*publici juris*," and principles of private rights prevailing as

Curnen v. The Mayor, &c., of the City of New York.

to transactions between private individuals do not fully apply.

The whole matters of opening and widening streets, establishing parks, and other matters of public concern, are conferred upon the corporation by statutes as mere executors of the public will, and its officers act in obedience to such legislative enactments for the *public benefit*, and not particularly for any private or local interests, or in respect to their proprietary rights. (Dillon Mun. Cor. § 772; *Marmilian v. The Mayor, &c., of New York*, 62 N. Y. 164; *Tone v. The Mayor, &c., of New York*, 6 Daly 343, affirmed in Court of Appeals June 12, 1877; 5 N. Y. Weekly Dig. 66.) They are not responsible (beyond what the law prescribes) for acts done in the *due* execution of such powers, nor for any collateral obligations they may assume in respect to them. (*Brick Presby. Ch. v. The Mayor, &c., of N. Y.*, 5 Cow. 538.) No entry in the books of the corporation relating to such a transaction of what has *lawfully* transpired can be regarded by way of an admission of what has occurred otherwise than in due course of the execution of their powers as conferred by statute. Being solely the administrators of such a public trust, their agents could not, without express authority from the corporate body, make any entry in the books of the corporation in deviation or derogation of the powers and duties thus conferred by statute. The entry of payment of the assessment in question was in no respect that of a private person of a debt due him, but, beyond which there might be matter of question between them, or such as was merely of private right. It had relation solely to that which concerned the public.

Payment thus received from the Killians was subject to every consideration of equitable or legal cognizance, as one made by mistake. The duty of the corporation was simply to collect the assessments, and the Court of Appeals, in *Mayer v. The Mayor, &c., of New York* (63 N. Y. 455), say, "If an entry of payment is made, no reason is shown why, upon discovery of the mistake, it might not have been cancelled and the collection enforced against the person liable to pay the

Curnen v. The Mayor, &c., of the City of New York.

assessment, or upon his default by a sale of the land upon, and in respect to which the assessment is made." It was under that principle that in the action brought by the Killians the court adjudged, that the money so paid by them was for want of an intelligent agreement between payers and payee, and made by mistake of the former, ineffectual as a payment discharging the lien, but "*ex æquo et bono*" ought to be returned to the Killians. The payment having been so made by mistake, and such judgment having been rendered between the parties to the transaction without the intervention of the plaintiff, it remains but to be considered how far the defendants can be made liable upon the alleged claim of the plaintiff that the lien of those assessments was in fact thereby extinguished and incapable of restoration, or what were her rights as *bona fide* purchaser of the property. The judgment was that the assessments never had been paid, and therefore no *restoration* of the lien could be predicated upon the transaction. The plaintiff shows no privity with the Killians by virtue of which such payment could be asserted as having been made by them of right or obligation, and her present action can only be sustained upon some application of the principle of *estoppel*. In this respect it is wanting in every particular or element upon which such right could be predicated.

So far as the corporation are concerned, they were acting through their collector as mere public agents. They were liable to refund moneys paid them through an unjust exaction, as also for that which was paid by mistake; and, as was held in *Mayer v. The Mayor, &c., of N. Y. (supra)*, money so paid by mistake did not operate as a payment. They in the present case simply received from the Killian brothers the money offered them in payment of these assessments, and a corresponding note or memorandum of the fact was made on their books. Any equitable considerations growing out of such entry was not chargeable to any misfeasance of theirs. No knowledge or notice of the relations of the Killians or of the plaintiff to the property was communicated to them otherwise than through the asserted interest of the former to pay

Curnen v. The Mayor, &c., of the City of New York,,

the assessments and discharge their lien. No obligation rested upon them to investigate the remote relations of the parties in the property, nor can any negligence be imputed to them in accepting the sum tendered by the Killians and making a corresponding entry of the payment. The *act of entry* in the books of the collector of assessments of such payment by "Killian Brothers" was but their private acknowledgment and memorandum of the fact. It, in itself, neither had in the circumstances of the case nor in any estimate of its character effected a discharge of the lien; it was not made with any view to influence the conduct of any other person; it but truly disclosed what had actually occurred, and instead of communicating any misinformation rather advised any person interested in and desirous of investigating into the subject of the persons who made the payment, and afforded the means of ascertaining in what right, in what connection with the title, or upon what consideration such payment had been made by the Killian brothers, so as to relieve the payment from possibility of recall, or as made in some right that would attach the continuing lien for such payment.

The legislature, out of regard to the interests of *bona fide* purchasers, and to afford them ample immunity from assessments remaining unpaid "twelve months or over," have, by the act of 1853 (chap. 579, sec. 16, Davies' Laws, N. Y. City, 1149), provided for such a case as the plaintiff has presented, by means of a certificate of the clerk of arrears, and his receipt for such assessments (if any) unpaid to be countersigned by the comptroller, which is thereby made "*conclusive evidence*" that there was no other such lien by way of assessment, and it forever *freed the lot* from any other such liens due thirteen months or over prior to such receipt (as were these in question). Had the plaintiff taken this precaution of obtaining the receipt for payment of the other assessment ("for paving 55th street, \$130 60") she would have availed herself of the precaution the law pointed out, and which ("*expressio unius est exclusio alterius*") the legislature has fairly indicated as the only means of concluding the defendants from such a claim as is presented in this action. From

Curnen v. The Mayor, &c., of the City of New York.

these considerations the judgment should be affirmed because, first: The defendants acted strictly in the line of their public duty, and are in no respects liable for injuries occurring to others through the acts of their officers while complying with the law, without misfeasance, and none has occurred through any illegal act of theirs, authorized or sanctioned by the corporation. Second: No principle of estoppel applies to acts so done in performance of a public duty. Third: No act was done by defendants or their authorized agents with notice or knowledge of the intended action of the plaintiff, or with any intention to promote or influence the conduct of the plaintiff. Fourth: The entry made in the records of the collector of arrears of taxes was true, so far as defendants were concerned, until its revocation by some equitable right asserted and established "*ex æquo et bono*." Fifth: Such entry fully advised the plaintiff by whom such payment was made, and afforded her the means of ascertaining in what right, or upon what consideration, such payment was made by an apparent stranger to the title. Sixth: The law afforded her, under the provisions of the act of 1853, ample means of protection from such a lien. Seventh: They were exclusive, as the mode of estopping or debarring the defendants from asserting the continued existence of such liens, notwithstanding any irregular acts of their officers by which through receipts, or entries, acknowledgments or other "*prima facie*" proof of payment and satisfaction might be established; and, lastly (but a minor point), plaintiff fails to prove (although she so asserts) that she acted in paying the entire purchase money, without deducting or providing for these assessments, under *implicit* and sole reliance on the entry in the collector's books.

The judgment should be affirmed.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Judgment affirmed.

Betz v. Conner.

JOHN J. BETZ, Respondent, *against* WILLIAM C. CONNER,
Sheriff of the city and county of New York *et al.* Appellants.

(Decided April 1st, 1878.)

Where after a levy and sale by the sheriff of personal property of an execution debtor which before the sale is kept and used by the debtor in his own name on the premises where he resides, the property after the sale remains in the same premises still occupied by the debtor, and is used and controlled by him in all respects as before, except that after the sale he acts as agent of the purchaser at the execution sale:—*Held*, that the change of possession is constructive and not actual, and the sale is, under the Statute of Frauds, presumptively fraudulent as against creditors of the person whose property is thus sold.

The fact that the sale is made by the sheriff under a valid execution, instead of being made directly by the execution debtor to the vendee, makes no difference in the application of that statute.

Where, at the close of the case, counsel made requests to charge several propositions of law applicable to the case, and the court afterwards in its charge did not include or refer to the points requested, and subsequently on its attention being called to the omission, refused to alter its charge,—*Held*, that exceptions then taken to each refusal to charge as before requested were specifically taken and were to be considered on appeal.

APPEAL from a judgment in favor of the plaintiff, entered upon a verdict rendered at a trial before GEO. M. VAN HOESSEN, J., and a jury, and from an order denying a motion made upon the minutes for a new trial.

This action was brought by Betz to recover damages for levying on and selling goods of the plaintiff in his premises at the foot of 71st street, East River, and for levying on property and interfering with plaintiff's business at the brewery at 60th street and 9th avenue. The defence was justification under executions against one Michael Groh who, it was alleged, had a leviabie interest in the property in question and carried on the business at the places named.

A. J. Vanderpoel and H. W. Bookstaver, for appellants.

Betz v. Conner.

Thomas Allison, for respondent.

JOSEPH F. DALY, J.—The judgment debtor, Michael Groh, carried on the brewery and saloon business at 60th street and 9th avenue for a long time prior to March 11th, 1875, and on that day all his property on the premises was sold by the sheriff, under six executions issued upon judgments in favor of the German Exchange Bank against him. The plaintiff, Betz, purchased all the property at the sale. The day before the sale Betz proposed to Groh that in case he, Betz, bought the brewery he would hire Groh to run it. Immediately after the sale, by an agreement in writing, Betz hired Groh to manage the brewery at a salary of \$150 a month, with the proviso that Betz might terminate the hiring by one month's notice. Groh thereupon entered upon the premises and managed the business; the old checks and bill-heads were used with the word "agent" added to Michael Groh's name; the bank account was kept in the name of "Michael Groh, agent;" but Betz furnished the money and material to carry on the business; attended to and looked after the business every day; bought the lease of the brewery which Groh held, and which was sold by the sheriff; took a new lease in his own name when that expired in September, 1875; and the business of the concern with the U. S. Revenue department was transacted in his name, and dealers with the concern were informed that he was owner; the premises (vaults) at the foot of 71st street, East River, were hired by Groh in his own name but for Betz, after the sale, and the property stored there was manufactured at the brewery at 9th avenue and 61st street under new arrangements; Groh's sign, however, remained up over the bar after the sale for about a year; Groh's name was kept on the wagons, and on the checks as well as the bill-heads; Groh and his family resided at the premises 61st street and 9th avenue after the sale as they had before it; he was general manager of the brewery after the sale; he "ran the machine," to use his own expression, for Betz.

From this, the undisputed evidence in the case, it will be

Betz v. Conner.

seen that there was no "actual and continued change of possession" of the brewery and the business after the sale by the sheriff to Betz. Groh lived there and had charge as fully after the sale as before. It is true he was there merely as the agent of Betz (the jury having found by their verdict that Betz was a *bona fide* purchaser), but the change of possession from Groh to Betz was constructive and not actual, and the case was directly within the statute. (2 R. S. 136; *Randall v. Parker*, 3 Sandf. 73; *Stout v. Rapelhagen*, 51 How. 75.) The possession of Groh was terminated, of course, by the levy and sale, and he was out of possession while the sheriff was in, but he resumed possession after the sale, under Betz, the vendee, without any intervening change of title, and the change of possession was therefore not "continued" and the case was within the statute. (*Tilson v. Terwilliger*, 56 N. Y. 273.) The fact that the sale was made by the sheriff to Betz under valid executions, and not by Groh to Betz, makes no difference in the application of the statute. (*Fonda v. Gross*, 15 Wend. 628; *Gardenier v. Tubbs*, 21 id. 169.) After the purchase by Betz, the plaintiff, there being no actual and continued change of possession, the sale was presumptively fraudulent and void against the creditors of Groh. After the case was summed up by the counsel for defendants, he asked the court to charge seven propositions, the first three as follows: "I. There was no actual and continued change of possession after the sheriff's sale in March, 1765, and the title of the plaintiff, Betz, was *prima facie* fraudulent and void as against the creditors of Groh. II. The employment of the debtor, Groh, immediately after the sale on the execution and allowing him to carry on the business in his own name as agent did not constitute an actual and continued change of possession of the property. III. The presumption of fraud as against creditors which arises under the law when the debtor remains in possession of the property after a transfer of title does not consist in the actual deception of the creditors, but in doing the acts with the intent to deceive or defraud them."

The first two requests were proper and should have been

Betz v. Conner.

charged by the court. The learned judge who presided at the trial did not signify whether he would so charge or not after the requests were made by defendant's counsel; plaintiff's counsel then summed up; the court then charged the jury, but did not in any manner refer to the question of possession or the statutory presumptions arising therefrom, but he did charge substantially in accordance with the remaining four of defendant's seven requests, which related to the question of fraudulent intent and the good faith of the parties. After his charge defendant's counsel addressed the court, saying: "I ask you to make a charge as to each of my requests." The learned judge replied: "I shall decline to charge any different from what I have charged," and then addressed the jury on another proposition relating to the question of damages. Defendant's counsel then said: "I except separately to each of the requests you did not charge, and ask that you charge as made, and I make a specific request as to each of the requests and except to the specific refusal of each one of them."

This exception seems to be good, and there seems to be no force in respondent's suggestion that defendant was bound, when the judge stated that he declined to charge any different from what he had charged, to repeat in detail such of his requests as he thought had not been covered by the court's instructions to the jury. The defendant's requests were but seven in number and were made after he had summed up. The point of the first two was distinctly presented, and the court could not have overlooked it. As it was not presented to the jury, and as the learned judge declined to instruct the jury otherwise than as he had already instructed them, it is clear that he deemed the propositions unsound or inapplicable, and did not omit them from his instructions inadvertently. The cases relied on by respondent do not touch the case. In *Walsh v. Kelly* (40 N. Y. 556) the judge had substantially embraced all the points of the requests in his charge. In this case the charge was silent on the question of the statutory presumption. Had the charge touched upon the question in any manner, but not contained the

Betz v. Conner.

specific instruction requested, counsel might have been required to restate his proposition separately and take his exception to the ruling then made. In *Ayrault v. The Pacific Bank* (47 N. Y. 570) counsel presented sixteen requests to charge upon distinct points presenting substantially the same question in divers forms and with nice distinctions. Whether they were all especially and succinctly noticed by the judge in his charge is not important. Doubtless all that were material were responded to, but this can only be ascertained by a careful and critical study of the charge and the requests in connection. . . . The exception is to the "refusal to charge each of the requests submitted except so far as is embraced in the charge delivered;" and the exception was also "to every part of the charge which is inconsistent with such requests." These exceptions were held to be too general.

In *Requa v. The City of Rochester* (45 N. Y. 129) ten propositions were submitted to the judge, who proceeded to charge the jury and substantially adopted some of the propositions. At the close of the charge the counsel excepted to the *charge* in all the particulars specified in those written requests, "so far as the judge had not charged as requested;" this exception was held not to have pointed out in what the counsel conceives the court has erred, and gave no aid for the correction of any error into which the judge had fallen. In *Zabriskie v. Smith* (13 N. Y. 322) "the charge covered generally the questions of law presented . . . the defendant's counsel, if he conceived that any one or more of them was *not sufficiently answered*, should again have called the judge's attention to it." In all the other cases cited by respondent's counsel, it appears that the exception to the charge was too general, or that the proposition as to which *instruction* was requested had been touched upon by the court in its charge, and counsel had neglected to point out, by an additional specific request *after* the charge, a point which the court might be reasonably supposed to have overlooked.

The simple question here is, whether in a case under the

Cooke v. *Ætna Insurance Co. of New York.*

familiar Statute of Frauds—defendant's counsel having presented seven requests to charge, two of them based upon the 5th section of the statute as to actual and continued change of possession, and the court afterwards instructing the jury but omitting all reference to the statute, or to that section, or to the question of possession, and when the counsel calls the attention of the court to his requests and the court declines to charge differently from the charge already made—the counsel is bound to restate his request. I think not. There can be no suggestion of inadvertence in omitting the charge as requested.

For the error the judgment should be reversed and a new trial ordered, with costs to abide event.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

GEORGE K. COOKE *et al.* Respondents, *against* THE *ÆTNA*
INSURANCE COMPANY OF NEW YORK, Appellant.

(Decided April 1st, 1878.)

A parol contract of insurance made by an incorporated fire insurance company, the charter of which does not limit its powers of insuring to written policies, is valid.

If the provisions of its charter are that it may insure, and that all policies shall be subscribed and countersigned by certain of its officers, it has power to make a parol contract of insurance.

A parol agreement to insure certain property in a certain building for a certain term from date and for a certain amount, although the rate of premium is left uncertain and to be fixed by the company after inspection of the building, is a complete contract of insurance, and the company will be bound for a loss occurring thereafter in the term and before the rate of premium has been communicated to the assured.

Where the principal clerk of an incorporated fire insurance company, whose duties

Cooke v. *Ætna Insurance Co. of New York.*

were to receive applications, fill out policies and renewals, and to "generally attend to whatever was transacted behind the counter," made at the place of business of the company a parol contract of insurance with an applicant, *Held* that the company were bound by the act of the clerk.

APPEAL from a judgment entered upon a decision of the general term of the Marine Court of the city of New York, affirming a judgment entered upon a verdict for plaintiffs rendered at a trial term of that court, and affirming an order of the special term of that court denying a motion made upon case and exceptions for a new trial.

The action was brought to recover \$1,500 and interest from January 30th, 1876, on policy of fire insurance. In February, 1875, defendant insured plaintiffs against loss or damage by fire: "\$800 on their vulcanizer, moulding presses, lathe tools, machines, type and materials for the manufacture of rubber, stereotype and hand stamps; \$100 on their office and shop furniture and fixtures, safe, partitions and improvements; and \$600 on their stock finished, unfinished and in process, merchandise, hazardous and extra hazardous, all contained in the brick and stone building situate at No. 92 Chambers street, New York City," for one year, commencing February 19th, 1875, and ending February 19th, 1876. In the latter part of July, plaintiffs moved their machinery (insured at \$800), one desk of the value of \$10 (part of the office furniture insured at \$100), and what other property does not appear, to a building in Williamsburgh, L. I., on the corner of First street and South Eleventh street, and there continued manufacturing; the goods as manufactured being sent to 92 Chambers street, there to remain until delivered; plaintiffs having retained the premises originally insured, and having left there such property as had not been removed to Williamsburgh. About July 28, 1875, at or about the time of moving, one of the plaintiffs, Oliver H. Perry, went to the defendant's office in New York City and asked Mr. Richardson, the company's principal clerk, whom he saw behind a counter at a desk, to transfer the insurance to the building corner of First street and South Eleventh street, Williamsburgh, and handed Mr.

Richardson the policy. Mr. Richardson assented either by word or sign. Mr. Perry asked him what the rate would be, and he said he would examine and let plaintiff know; plaintiff asked him if he would make it binding to-day, or at that time, and his reply was "Yes." He may have said something about an increased rate; plaintiff referred to the other insurance on the Williamsburgh property, and asked if the company could reduce the rate to the same. Mr. Richardson was to inform plaintiffs about the rate, and it was after that he said he would keep the policy binding. Plaintiff then left the policy and went away. Nothing further was said or done between the parties. On October 9th, 1875, a fire occurred in the Williamsburgh premises, by which the plaintiffs lost \$4,157 35 on their machinery, \$125 65 on furniture and \$2,112 97 on merchandise. Mr. Perry went on that day to the company's office, saw Mr. Bogart, the secretary, who stated they had no insurance on that building; he afterwards received the policy in a letter. The evidence of Mr. Richardson, on the other hand, was positive that plaintiff came to the office on August 11, 1875, and gave him the policy, saying: "You are charging me too high; I want the rate reduced. I have moved to a much better place than I was before. If you cannot reduce the rate I want you to cancel the policy;" that witness looked at the map and replied, "Instead of reducing the rate we ought to increase it very much by the indications on the map;" plaintiff said, "I cannot pay any more. If you cannot reduce the rate I want you to cancel the policy;" that the witness told him to step in in a day or two and they would have a report by the surveyor and would tell him exactly what they could do about it; that plaintiff went off; that the survey was made and the risk found to be much greater; the policy was placed and kept in a pigeon hole among the cancelled policies. He testified also that plaintiff did ask him to make the policy binding, and that he answered that he could not until they had a report from the surveyor; that plaintiff told him there was a responsible company insuring this place in Brooklyn at a lower rate, and he would like his policy brought down

Cooke v. *Ætna Insurance Co. of New York.*

as low as that; witness made a memorandum "*survey*" on the application and survey books while plaintiff was talking to him; it was a direction to the surveyor to go and examine the risk; this was made while plaintiff was talking; he saw it, and witness stated the substance to him—that he wanted to move to such a place—and read it off to him. Plaintiff being recalled denied all this. The court instructed the jury that if they believed the evidence of the plaintiffs their verdict must be for plaintiff; if they believed the evidence of the defendant's witnesses the verdict must be for defendant. The jury found for the plaintiffs in the full amount of the policy. A motion for a new trial was denied

Henry E. Davies, Jr., for appellants.

N. B. Hozie, for respondent.

JOSEPH F. DALY, J.—The verdict of the jury having established the correctness of plaintiff's version of the transaction between him and Richardson, the clerk of defendant, the first question to be considered is, whether plaintiff Perry's testimony showed a valid contract for insurance of property in the building in Williamsburgh. The plaintiff's application in July, 1875, was for an entirely new insurance; the application was definite and certain in all particulars, for by handing over the old policy with the request to transfer the insurance to the building specified, plaintiffs in effect applied for insurance to the amount, and upon the goods, and in the proportion for each class as set out in the old policy, and on the terms, and subject to the conditions, and at the rate specified therein. and for a term to end on February 19th, 1876; but describing the building where the goods were as the corner of First and South Eleventh streets in Williamsburgh. If Mr. Richardson had authority to bind the company, the company assented to the application and agreed, in answer to plaintiff's inquiry, that the new insurance would be binding that day, or from that time, leaving nothing unsettled but the rate of premium.

The insurance, although by parol, was valid. (*Fish v. Cottenet*, 44 N. Y. 538.) The defendant's charter declared that all policies should be subscribed by the president or vice-president, or by a president *pro tempore*, and countersigned by the secretary or assistant secretary; but this provision applies only to cases where the contract of insurance is evidenced by a writing, and does not destroy the power to make a parol contract. (*Trustees of the First Baptist Church v. Brooklyn F. I. Co.*, 19 N. Y. 305.) Did the minds of the contracting parties meet as to the essential points to the contract for a valid insurance, *i. e.*, as to the premises, the risk, the amount, the time and the premium? (Same case, 28 N. Y. 153.) As to the premises and the amount there can be no question; as to the risk I think there can be none, because the insurance was agreed to on the spot. A company may, *in good faith*, take whatever risk it please, and if it choose to make a contract with a knowledge of *the particular building* and the amount required before examining the premises it agrees to that risk. As to the time of the policy, I have suggested that it was certain, because the insurance in the policy then running was to be transferred to the new premises, and that was insurance terminating on February 19th, 1876. As to the premium, plaintiff having asked for and received assurance against loss *from that day*, with the understanding that the rate was to be fixed by the company upon examination, would be bound to pay such reasonable premium as the company exacted for the insurance he had thus obtained. The company by its agreement contemplated taking the risk offered and of charging the rate warranted by it, and the assured understood and assented to this. Such an open arrangement has never been held too indefinite to be the basis of a valid contract. (See opinion of Judge Emott in case last cited.) I apprehend it will never be decided that a present contract for insurance is invalid because the amount of premium is not mentioned on either side, but is left until the policy is made out and delivered, and the receipt for the premium is tendered. Insurances are thus made every day, and if a fire should occur between the time the parol con-

Cooke v. *Ætna Insurance Co. of New York.*

tract of insurance was made and the policy was written out, the objection that upon one valid element of the contract, viz.: the premium, the minds of the parties had never met, would receive little favor. The universality of fire insurance, and the fact that rates are established for insurable risks, is a matter the court may take notice of, and assume that parties contracted with reference to it; what the rate may be for a particular risk is, however, matter of proof; the assumption is merely that the assurance has a value and that such value is susceptible of proof.

The authority of Mr. Richardson to make a valid contract by parol, in the manner and under the circumstances indicated in plaintiff's evidence is, I think, clear. He was the principal clerk of the company, and his duties were to receive applications, fill out policies and renewals, mark risks for surveyors, and "generally attend to whatever is transacted behind the counter;" when policies are filled out they are submitted to the president and officers. This application was made to Mr. Richardson while he was behind the counter at the office of the company; he was in their employ to receive just such applications; if he assumed to do more than his authority warranted, and give applicants assurance that the risks they presented were accepted, and sent them away with the impression that they had secured insurance against loss, it is manifest that the company and not the applicant should suffer from the assumption of power. The latter was not bound to know that the person authorized to receive applications, and "generally attend to whatever is transacted behind the counter," was not authorized to agree with him for assurance. The general agent of a company may delegate to his clerk his power, which is the whole power of the company (*Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117), and the company may do the same thing, and delegate its powers to whichever of its employees it pleases to place in its office to transact its business there; and if it may invest such employee with power it may equally clothe him with an apparent authority, and will be liable to all persons dealing with him in reliance thereon. It should be borne in mind that in the

Cooke v. *Ætna Insurance Co. of New York.*

case at bar Mr. Richardson does not testify that he did *not* have power to contract.

The defendant offered evidence to show that the risk was increased by removal of the property to Brooklyn ; this was properly excluded. The risk, whatever it was, had been accepted by the new contract ; the insurance on the property in Brooklyn was exactly what was contemplated. No offer was made to show that the insurance was avoided by reason of the breach of any covenants in the old policy, which expressed the conditions of the new agreement.

The thing to be insured within the agreement of the parties was, however, the property named in the original policy ; this included certain machinery insured for \$800, certain furniture insured for \$100, and stock finished, unfinished and in process, and merchandise, *i. e.*, the shifting stock and material of a factory. The insured machinery to manufacture goods was taken to the Williamsburgh building, and as the process of manufacturing was to proceed where the machinery was, the agreement must be construed to extend to stock finished, unfinished and in process at the place of manufacture, which was now in Williamsburgh, as it had formerly been in Chambers street. But only one article (of the value of \$10) of the second class of insured articles (furniture) was removed to Williamsburgh, and thus became covered by the new insurance. The recovery was therefore too great by \$90 and interest.

This deduction must be made, therefore, and the judgment for the residue affirmed. No costs of this appeal.

CHARLES P. DALY, Ch. J., and VAN HOESEN, J., concurred.

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Judgment reduced in the sum of \$90, and affirmed as to residue without costs of appeal.

Vol VII.—36

Brink v. Fay.

JOHN W. BRINK, Appellant, *against* EDMUND B. FAY, *et al*,
Respondent.

(Decided April 1st, 1878.)

A master may, before the expiration of a term of hiring, discharge his servant for bringing actions for instalments of wages, that are not yet due, and for talking of these actions with his master's other servants and with members of firms of merchants competing in business with his master, and saying that his master is in such poor credit that he has had to sue him for his wages.

If the servant, recklessly, and with a disregard of consequences to his master, does what is likely to work substantial injury to his master, the latter may discharge him and terminate the hiring and bringing vexatious and unfounded suits against his master is such conduct.

APPEAL from a judgment entered against the plaintiff, on an order of the court at special term, JOSEPH F. DALY, J., dismissing the complaint.

The action was brought by Brink to recover damages for a breach of contract of hiring. The complaint alleged that the defendants employed the plaintiff under a written contract for the term of two years from January 1st, 1876, at the salary of \$2,000 per year, and that on the 22d day of September, 1876, the defendants without just cause discharged the plaintiff.

It appeared by the plaintiff's testimony that up to May, 1876, the defendants had paid the plaintiff four months' salary, and that about the middle of May he brought an action against his employers for two weeks' salary, and afterwards brought several other actions to recover other semi-monthly installments of salary, which he claimed was due from his employers. One of these actions, it also appeared, brought in a District Court, resulted in a verdict and judgment for the plaintiff, which judgment on appeal to this court had

Brink v. Fay.

been reversed, on the grounds that the justice before whom the action was tried erroneously admitted parol evidence as to the time of payment of the salary, and that under the written agreement alone plaintiff had no cause of action for his salary until the expiration of the year. It appeared also by the plaintiff's testimony that he had during the time he was employed, consumed time in attending court, consulting his counsel in connection with these actions, had compelled the book-keeper of the defendants to attend in court as a witness, and had talked about his, the plaintiff's suits, with the other employees of the defendants, as well as with salesmen and members of firms competing in business with the defendants, but that he did not think he was thereby injuring defendants. The plaintiff was asked several questions by his counsel as to his motive in suing his employers, which were ruled out by the court, and to this ruling and to the dismissal of this complaint exceptions were taken by the plaintiff. Defendants put in evidence the papers in the different actions brought by plaintiff.

William A. Coursen, for appellant.

If hired for a definite term the servant cannot be dismissed by the master before the expiration of the term unless for immoral conduct, willful disobedience, habitual neglect, incompetency or permanent disability from illness. (Kent, vol. II., p. 286; Schouler's Domestic Relations, p. 612; Smith, Master and Servant, p. 212.) The exclusion of evidence of plaintiff's motives in bringing actions against defendants was error. (*Griffin v. Cranston*, 1 Bosw. 281; *Miller v. The People*, 5 Barb. 203; *Nichols v. Pinner*, 18 N. Y. 297.)

Amos G. Hull for respondent.

The plaintiff's conduct was inconsistent with his duty, and defendants were justified in discharging him. (Chitty on Contracts, p. 580, and notes, 5th Am. Ed.; *Adams Exp.*

Brink v. Fay.

Co. v. Trego, 35 Md. 64; *Nichol v. Martyn*, 2 Esp. 732; *Ridgway v. The Hungerford Market Co.*, 3 Adol. & Ellis, 171; *Locy v. Osbaldiston*, 8 Car. & P., 80; *Harrington v. First Nat. Bank*, 1 Sup. Ct. (T. & C.) 367; *Wood's Master and Servant*, p. 166; *Petersdorff's Master and Servant*, p. 28.)

VAN HOESEN, J.—On the 15th day of November, 1875, the plaintiff agreed to enter the service of the defendants, Fay, Hazen & Company, on the first of January, 1876, and to sell goods for them, and assist in the parasol department of their store during the years 1876 and 1877, for two thousand dollars per year, and three hundred dollars per year extra for work in the parasol department. On the 26th of November, 1875, the defendants agreed to pay the plaintiff in addition four per cent. on all sales made by him in excess of fifty thousand dollars per year to customers whose trade was brought to the house through his influence. No time or times at which the plaintiff was to receive his wages were specified.

The plaintiff was sometimes paid every two weeks, and soon insisted that he had a right to draw his pay fortnightly. This the defendants denied. The plaintiff then sued the defendants in the Marine Court for \$83 33. That action was begun on May 15th, 1876. On the 1st of July, 1876, he began an action in the Common Pleas against the defendants for \$166 67. The summons and the complaint in that action were afterwards amended by increasing the amount claimed to \$588 33. On the 15th day of June, 1876, the plaintiff sued the defendants in the Eighth District Court, and on the 20th of September, 1876, he brought another action in that Court. The action last mentioned was discontinued on the 26th of September. The plaintiff swore that, except when the first suit in the District Court was tried, but little of his time was taken up in the prosecution of these various actions.

The plaintiff further said that whilst in the service of the defendants he had told ten, perhaps fifteen, persons about his

Brink v. Fay.

suits. Many of these persons were salesmen in the defendants' employ, but some were members or employees of firms competing in trade with the defendants.

On the 22d of September, 1876, Mr. Martin, one of the defendants, discharged the plaintiff, saying, "You are an unfaithful employee. You are attempting to injure the credit of the house. Your services are no longer needed." The plaintiff then left, and brought this action for damages for his discharge, which he believes to have been wrongful.

After the plaintiff had testified, and the defendant had put in evidence the papers in the different actions brought by the plaintiff, the judge at the trial dismissed the complaint, saying, "A servant who wishes to remain in the employ of his master, and yet sues him repeatedly, occupying the position of an adversary at law, must see to it at his peril that he has a good cause of action; for, if his suit be premature, it is in his employer's power to dismiss him on the spot. Now the law laid down by the general term is that the suit (begun in the Eighth District Court, June 15th, 1876,) was premature, and I hold, therefore, that his employers had a good cause of dismissal, on account of his having brought these suits. For that reason I dismiss the complaint." It may be necessary to say here that the general term had previously held, on an appeal from the judgment rendered by the Eighth District Court, that as the contract of hiring was in writing, parol evidence could not be received to show that the defendants agreed orally to pay the plaintiff fortnightly, and that as the written contract contained no provision as to the times of payment, the plaintiff could not demand payment till the expiration of the term of employment.

The single question presented to us on this appeal is: Did the conduct of the plaintiff give the defendants good and sufficient cause to discharge him? It is not wrong for a servant to make an honest appeal to the law to compel his master to pay him his wages. If a master will not pay what is due, it is the right of the servant to ask the courts to aid him in getting his hire. But if the servant drags his master into court as much for spite as for the sake of wages, he

Brink v. Fay.

shows that he seeks to do his master harm, and ought to lose his place. What is it but unjustly to vex the master, for the servant to sue him for wages that are not due? The servant, like the master, is bound to know the law, and to know the times at which he may get his pay. If the written contract be silent as to the times of payment, the servant must wait for his wages till his work be all done. He may show a general custom, or even a special custom of his master, to pay at certain stated times, but he cannot alter or vary the written contract by proof of an oral promise to pay in part payments. A servant, when pressed to pay a bill which he is not able to meet, might give as an excuse for not paying the failure of his master to pay him, but if he maliciously, or even wantonly, spread the report that his master did not pay his servants, the master would not be bound to keep him. Tatling, or disclosing family secrets, is a good cause for turning a servant away. (*Beeston v. Collyer*, 2 C. & P. 607.) In short, the servant is in duty bound to care for his master's interests, and if with a bad motive, or through recklessness or thoughtlessness he does what is likely to work substantial injury to his master, he may be discharged. In this case there is no doubt as to what the plaintiff did. His own testimony proves that he repeatedly sued the defendants for wages that were not due, and that he needlessly told rival traders that the defendants were in such poor credit that he had to sue them for his salary. This shows that he took a hostile position towards his employers, which made it unsafe for them to trust him with their interests. How could they rely upon him as an assistant whilst he was casting doubt upon their solvency? Though a temperate and honest resort to the courts to obtain a determination or an enforcement of his claims is the lawful right of a servant, whilst still in the employ of the master whom he sues, yet the bringing of four suits, and the simultaneous spreading of damaging statements respecting his employers, indisputably prove defiance and hostility, and are entirely out of accord with the spirit that should govern a servant in his relations with his master. The plaintiff did not ask the judge to submit to the jury the

Brink v. Fay.

question whether the acts of the plaintiff, and the spirit he manifested, were such as to make it unsafe for the defendants to retain him in their service, but even if such a request had been made, I think the facts that were established were such as to call on the judge to decide whether or not as matter of law the discharge was lawful.

I think the judgment should be affirmed with costs.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Judgment affirmed.

INDEX.

A

ACCOUNT STATED.

1. Where the defendant having sold goods for plaintiff's account sent him an account of the sales, and the plaintiff called several times at the defendant's place of business for the purpose of getting further explanations in regard to it without seeing the defendant, and afterwards, on seeing the defendant, was paid something on account and promised a more detailed statement of the sales, showing the names of the persons to whom they had been sold, etc., and the plaintiff waited a long time for such further statement, and wrote for it, but it was not sent: *Held*, that the first account sales furnished to the plaintiff by the defendant had not, by the action of the parties in regard to it, been made an account stated. *Carpenter v. Nickerson*, 428
2. Where the plaintiff deposited with the defendant for collection a sight draft which the defendant sent to its agent, a corresponding bank, for collection, and such correspondent, before the draft had been collected, but supposing that it had been credited the amount thereof to the defendant, who thereupon gave credit therefor to the plaintiff, and the correspondent bank afterwards having discovered its mistake charged back the amount of the draft to the defendant, and the plaintiff, being notified of these facts, refused to take back the draft or have the amount of it charged to his account, and the defendant there-

upon accused its correspondent with delay in not returning the draft, and stated that it would be compelled to look to it for payment of it, and afterwards rendered the plaintiff an account without charging the draft back to him, and continued for two years to render him accounts in the same way: *Held*, that there was an account stated in respect to the draft, which precluded the defendant from denying its liability to the plaintiff for the amount thereof. *Harley v. The Eleventh Ward Bank*, 478

ACTION.

1. Any policy-holder in a life insurance company, incorporated under the general life insurance act of 1853, can maintain an action against the company for the purpose of compelling a settlement of the amount of the dividends which, under the provisions of the charter of the company, should be apportioned to the plaintiff as her share of the profits, and to compel the company to go on and transact its business as required by its charter, notwithstanding, in proceedings instituted by the attorney-general for the dissolution of the company, a receiver has been appointed. *Bedell v. The North American Life Insurance Co.*, 273
2. The fact that the affairs of a life insurance company—organized under the general life insurance act of 1853—are being wound up and adjusted in proceedings in the Supreme Court, under the care of a receiver, will not prevent this court from entertaining an equit-

able action to ascertain and enforce the rights of policy-holders in the company, either on the ground that a conflict of jurisdiction may be created, because any conflict of decisions may be settled by an appeal to the Court of Appeals, nor on the ground that a multitude of suits may be brought, because the court has the power in its discretion to allow one suit to be tried and stay all similar ones until that one is finally determined by the court of last resort. *ib.*

3. An action may be maintained by the owner of stock in a corporation against that corporation to compel it to transfer the stock upon its books. *Cushman v. The Thayer Manufacturing Jewelry Co.*, 330
4. Such an action is an equitable one, and the defendant is not entitled to a trial by jury. *ib.*

ALIMONY.

See DIVORCE.

AMENDMENT.

1. Where notice of appeal from a judgment of a District Court in the city of New York has been seasonably served on the justice, but no notice of appeal has been served on the adverse party, this court has power (under § 327 of the [old] Code of Procedure), after the time to appeal has expired, to allow an amendment to perfect the appeal by serving the notice of appeal on the adverse party. *Zinsar v. Seiler*, 464
2. The decision of the court in *Williams v. Tradesmen's Insurance Co.* (1 Daly, 322), upon that point followed, and *Morris v. Morange* (17 Abb. Pr. 86) disapproved, and *People v. Eldridge* (7 How. Pr. 108), *Sherman v. Wells* (14 How. Pr. 522), *Bryant v. Bryant* (4 Abb. Pr. 138), held not to have directly decided this question. *ib.*

—as to amending pleadings on appeal.
See COMMON CARRIER, 4.

APPEAL.

1. A judgment in an equity case will not be reversed on account of the admission of irrelevant evidence on the trial, unless the appellate court is satisfied that the decision of the judge who heard the case was improperly affected by it. *Consolidated Fruit Jar Co. v. Mason*, 64
2. Where there is no appeal from an order denying a motion for a new trial made upon the minutes, the question whether or not the verdict was rendered against the weight of evidence, or on insufficient evidence, cannot be considered on appeal from the judgment. *Wagner v. Jones*, 375
3. A re-argument will not be granted except where some question decisive of the case and duly submitted by counsel has been overlooked by the court, or where the decision made is in conflict with an express statute or a controlling decision, to which the attention of the court was not called by counsel. *Banks v. Carter*, 421
4. By the provisions of section 1316 of the (new) Code of Civil Procedure, an appeal from a final judgment does not bring up for review an intermediate order which has already been reviewed upon a separate appeal therefrom by the court or the term of the court to which the appeal from the final judgment is taken. *Wiener v. Morange*, 450
5. An intermediate order separately appealed from and affirmed by default, has "already been reviewed" within the meaning of section 1316 of the (new) Code of Civil Procedure. *ib.*
6. Where, on appeal from a judgment of a District Court of the city of New York to this court, the appellant desires, in addition to a reversal of the judgment, the restitution of money collected from him under an execution on the judgment appealed from, he should apply at the time of arguing his appeal for restitution in case the judgment should be reversed, and

in case he omits to do so, but succeeds in having the judgment reversed, he should apply for a re-argument on that point. *Cushing v. Vanderbilt*, 512

7. Where the judgment of reversal is not a final determination of the rights of the parties, restitution of the money collected on the judgment reversed is not a matter of right, and on appeals from District Courts, in which there is no power in this court to order a new trial, but a new suit may be brought to which the judgment of reversal would not be a bar, the general term of this court which hears and decides the appeal is the proper branch of this court to decide the question of restitution, and the special term will not entertain the application. *ib.*

8. Under § 366 of the (old) Code of Procedure, regulating appeals to this court from the Marine and District Courts in the city of New York, which provides that "the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits," this court may reverse a judgment of the Marine Court on the ground that the damages were excessive, although no motion for a new trial was made in that court. *Smith v. The American Institute of the City of New York*, 526

—as to amendment to perfect appeal.

See AMENDMENT, 1, 2.

ARREST AND BAIL.

1. An application to vacate an order of arrest, under § 204 of the Code of Civil Procedure (old), providing that a defendant may so apply at "any time before judgment," may be made after the rendition of a verdict in the action, and before the entering of the judgment thereon. *Fuentes v. Mayorga*, 103
2. The plaintiff consigned goods for sale to one H., and he turned them over to a firm of which he was a member, at the same time disclos-

ing the plaintiff's ownership, and the goods were sold by the firm. *Held*, that the transaction established no relation of personal trust or confidence between the plaintiff and the partners of H., and that in an action for a failure to pay over the proceeds of the sale, they were not liable to arrest under § 179, subd. 2, of the Code of Civil Procedure (old), as having received money in a fiduciary capacity. *ib.*

3. In an action in the Supreme Court, the defendant had been arrested, and subsequently the order of arrest had been vacated on the ground that the complaint united two causes of action, on one only of which the facts authorized the defendant's arrest. The plaintiffs discontinued the suit in the Supreme Court, and sued in this court, alleging, substantially, the same facts, but framing them so as to make a single cause of action, and procured an order of arrest against the defendant. *Held*, that this second order of arrest was vexatious and should be vacated. *Young v. Weeks*, 115
4. The defendant was arrested on affidavits showing that by fraudulent representations as to his affairs the defendant had induced the plaintiffs under an agreement theretofore made, by which the plaintiffs agreed to fill the orders of the defendant "to such parties as they may regard safe and responsible, and in such amounts as they shall deem proper,"—to sell and deliver to the defendant, and to his customers, at his request, goods to a certain amount, a part of which had not been paid for. *Held*, that there being nothing to show what portion of these goods had been sold to the defendant, and what portion to his customers, the order of arrest could not be maintained, and that the fact that the defendant had admitted that all the goods were sold to him upon his own credit, could not change this result, since the plaintiff must recover, if at all, on the facts alleged by them as their cause of action. *ib.*
5. The right which exists to arrest a factor for not paying over the proceeds of goods sold by him on commission is barred by the principal's

receiving from him the promissory notes of third parties, collecting some of them, and retaining the others, without any offer to return them. *Trunninger v. Busch*, 124

- 6 The case of *Kelly v. Scripture* (9 Hun, 283), and other cases, where, after dishonor of notes given by a factor for the balance due the original cause of action, was held to be revived, distinguished by JOSEPH F. DALY, J. *ib.*

ASSESSMENT.

1. Where, by a mistake, the amount of an assessment is paid to the collector of arrears of assessments in New York City, and an entry made on his books to the effect that the assessment on a certain lot is paid, this does not discharge the lien of the assessment nor prevent it (after the mistake has been rectified and the money refunded) from being enforced, even against the property in the hands of a person who purchased it upon the faith of such entry. *Curren v. The Mayor, &c.*, 544
2. The only way in which a purchaser of real estate can protect himself from the liens of assessment is that provided by the act of 1853 (L. 1853, c. 579, § 16), by which the certificate of the clerk of arrears, countersigned by the comptroller, is made conclusive evidence. Such certificate was intended by the legislature to be, and is, the only entry or declaration made by the officers of the corporation of the city of New York in relation to such matter which will operate as an estoppel upon it. *ib.*

ASSESSMENT OF DAMAGES.

1. *It seems*, that in actions for malicious prosecution, where the amount of the pecuniary equivalent for the plaintiff's loss of reputation and mental suffering, is not susceptible of exact proof, the plaintiff, upon assessment of damages,—his cause of action being admitted,—is not required to give evidence of damage, but the jury may give such damages as they think the injury warrants, including punitive damages; but if the plaintiff sees fit to give evidence

as to such points, the defendant may controvert it. Per CHARLES P. DALY, Chief Justice. *Thompson v. Lumley*, 74

2. *It seems*, that the defendant cannot, upon an assessment of damages, give evidence in mitigation of damages, where the direct effect of such evidence is to disprove the facts alleged by the traversable allegations of the complaint, and to show that no cause of action exists. Per CHARLES P. DALY, Chief Justice, *ib.*
3. The rights of defendants, and the practice upon assessments of damages, in various classes of cases considered. Per CHARLES P. DALY, Chief Justice, *ib.*

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. A cause of action accruing to an assignor for services rendered by him after the date of a general assignment for the benefit of creditors, but before the delivery of the assignment, does not pass to the assignee. *Crow v. Colton*, 52
2. A general assignment for the benefit of creditors to three assignees, who all accept the trust, vests the estate of the debtor in them jointly, and although one afterwards notifies his coassignees that he resigns the trust and will not act, and fails to give a bond, the two remaining assignees cannot act without him if he is living and has not been removed by the court, and a conveyance by them alone of the debtor's real estate is void as against the creditors. *Brennan v. Willson*, 59
3. *It seems*, that after all the assignees named in the general assignment have accepted the trust, no one of them can by any act of his own, or of his cotrustees, be relieved from the duties and powers with which he has thus become charged and clothed, and that he can only be relieved by an order of the court. *ib.*
4. *It seems*, also, that a failure of an assignee to give a bond is sufficient cause for his removal by the court. *ib.*

ATTACHMENT.

1. Where the affidavits upon which

a warrant of attachment is granted state facts and circumstances which have a legal tendency to make out the essential statutory facts required to be shown, and fairly call upon the magistrate to whom the application for the warrant is made to exercise his judgment on the sufficiency of the evidence, this is enough to give the magistrate jurisdiction to issue the warrant and to sustain it in case it is attacked on the ground that the facts stated do not make a case within the statute. *Easton v. Malavazi*, 147

2. The rule is the same whether the warrant is attacked in a collateral proceeding as being void for want of jurisdiction, or whether a direct application to set it aside is made in the action in which it was granted. *ib.*
3. Where the essential statutory fact to be shown was concealment with intent to avoid service of a summons. *Held*, that affidavits alleging absence of the defendant from his usual place of business and resort soon after the debt had been demanded of him, coupled with his refusal, when asked by plaintiff to give his address or residence, contained enough to fairly call upon the magistrate for the exercise of his judgment upon the evidence. *ib.*
4. A warrant of attachment cannot be set aside on motion, where the facts stated in the affidavit on which the warrant was granted, have a legal tendency to show that the statutory ground for the attachment exists, and are such as fairly called for the exercise of the judgment of the magistrate who granted the warrant, as to their sufficiency. *Allen v. Meyer*, 229
5. Where the affidavits on which an attachment had been granted against the property of the defendant, on the ground that he had disposed of his property with intent to defraud his creditors, showed that at a time when the defendant was largely indebted, and an execution against his property was in force and unsatisfied, and he was harassed by legal proceedings, he executed, and caused to be executed at the same time, three instruments relating to him

in another county, viz.:—1. A deed from himself to one S., a laborer employed by him upon the property, for a consideration as expressed of \$2,000. 2. A deed from the said S. to his (defendant's) wife, for a like expressed consideration of \$2,000; and 3. A mortgage upon the property by his wife to himself as trustee for his mother-in-law; that after those instruments had been executed, he retained them all in his own hands for about a month, and then caused them to be all recorded, two days before the recovery against him of a judgment for a deficiency in a foreclosure suit; also, that although these instruments were drawn up in the office of the defendant, who was an attorney, yet they were not prepared according to the ordinary course of business in his office, but that he attended to their preparation personally, and did not deposit them in the safe where he usually kept such papers, and that for several months after he had made the deed to S., the defendant continued to act as owner of the property, and spoke of it as his own, and gave directions about its management, and concerning repairs to and improvements upon it, etc. *Held*, that these facts were sufficient to sustain the granting of the attachment within the rule above laid down. *ib.*

ATTORNEY AND CLIENT.

1. Security for payment for services of an attorney in suits in another court will not be required as a condition of ordering another attorney to be substituted in his stead in suits in this court. *Matter of Davis*, 1
2. Notice to the defendant's attorney of the existence of a lien of the plaintiff's attorney upon such judgment as may be recovered in the action, is not notice to the defendant, and will consequently not protect the plaintiff's attorney in case a settlement is made by the parties to the action without providing for his lien. *Wright v. Wright*, 62

—as to when client will not be allowed to discontinue proceedings

to determine amount due his attorney,

See FORMER JUDGMENT, 1.

B

BAILEMENTS.

1. A gratuitous bailee who, without notice to the bailor, and without his authority, sends to auction the property which is left with him, and has it sold, is guilty of conversion of the property. *Dale v. Brinkerhoff*, 45
2. It is the duty of a gratuitous bailee who desires to terminate the bailment, to notify the bailor to take away the property, and if he does not then take it away within a reasonable time, or if he cannot after reasonable inquiry be found, then the bailee should place the property on storage at the risk and charge of the bailor, and where if the storage is left unpaid, it may be sold by the storekeeper for the payment of his charges when they approach near to the value of the article. *ib.*
3. Where barley was left with the plaintiff, a maltster, to be malted and stored for a contract price per bushel for the entire lot, and the person leaving the barley under such contract afterwards took away a portion of the malted barley and paid a portion of the price for malting and storage, and transferred the balance of the malted barley by indorsing over the maltster's receipts therefor to a third person who had notice from the receipts that the charges for malting and storage were as "per agreement," and the balance of the barley malted was delivered by the maltster to the third person, upon his promise to pay "the charges:" *Held*, that the plaintiff had a general lien on the malted barley for the unpaid balance of the original contract price for storage and malting, and could recover the amount of that lien of the person to whom the balance of malted barley was delivered. *White v. Hoyt*, 232
4. In such a case it is immaterial upon the question of the right to recover such balance of charges, whether or not the plaintiff knew before delivering the balance of the malted barley, that such balance had been transferred to third parties by the person who had left the same to be malted. *ib.*
5. Whenever the purpose of a transaction by way of pledge or mortgage is satisfied, the right of the pledgor to the surplus becomes absolute. *Earle v. The N. Y. Life Ins. Co.* 303
6. An insurance company having, after the death of a person insured, settled with the pledgees of the policy by paying them the amount for which the policy had been deposited with them by the insured as security, and having, as part of the settlement, agreed to pay the surplus due on the policy to those lawfully entitled to it: *Held*, that the assignee of the executor of the insured could recover in an action on the policy the amount of the surplus. *ib.*
7. Such claim of the assignee,—*held* to be a purely legal claim for money due upon contract, which the insurance company was liable to pay in full to the assignee, without deduction for expense incurred by the company in resisting the unfounded claims of other persons to the money due. *ib.*
8. The interest which a factor has in goods consigned to him under a *del credere* commission is, as against the consignor, as extensive as is necessary for the protection of the factor for his advances, and is limited by that necessity, and his right to collect the proceeds of such goods sold by him is not exclusive after his advances and charges are paid, and such right of collection may then be exercised by the consignor. *Merrill v. Thomas*, 393
9. Debts due such factor for consigned goods sold by him, after his expenses and charges have been paid, do not pass to the assignee of such factor under a general assignment for the benefit of his creditors, so as to give such cred-

itors any interest in the proceeds of their collection, and the assignee cannot be enjoined, at the suit of a creditor of the factor, from paying over to the consignor the proceeds of such debts collected by the assignee. *ib.*

10. *It seems*, that if the factor had collected such debts, and had so mixed the proceeds with his own funds that they could not be distinguished, they would pass to his assignee under a general assignment. *ib.*

BANKRUPTCY.

1. The courts of this State have jurisdiction of an action by an assignee in bankruptcy to recover the proceeds of the foreclosure of a chattel mortgage made by the bankrupt in fraud of his creditors. Such a suit is not a matter or proceeding in bankruptcy within § 711 of the U. S. Rev. Stat., providing that the courts of the United States shall have exclusive jurisdiction "of all matters and proceedings in bankruptcy." *Southard v. Benner*, 40
2. It is a good defense to an action brought against an assignee in bankruptcy for the conversion of personal property found by him in the bankrupt's possession, and taken and treated by him in good faith as assets of the bankrupt, and as to which the plaintiff's adverse claim existed while it was in the bankrupt's possession, that the action was not brought within two years after the cause of action accrued. *Edmond v. Appar*, 379
3. And the limitation in such a case is a defense as well in actions brought against the defendant personally as in actions brought against him as assignee. *ib.*
4. The statute begins to run from the time the demand for the property upon the assignee is made and refused. *ib.*

BASTARDY BOND.

See BONDS TAKEN *colore officii*.

BILLS AND NOTES.

1. In an action against a bank, on its certification of a check in the hands of an innocent holder for value, it is no defense that the check was procured from the maker without value, and by fraud, or that the name inserted by the maker, to designate the payee is fictitious, if the person whom the maker intended should under that name be paid under that name procures the certification, and under that name, and by the aid of that certification, procures the plaintiff's money. The statute as to notes made payable to the order of a fictitious person, considered and discussed. *The Merchants' Loan and Trust Co. v. The Bank of the Metropolis*, 137
2. A person who indorses a note before its delivery to the payee, with the intention of becoming surety for the payment of the note, is liable to the payee, who has advanced money or property, or given credit on the faith of such security, for the amount of the note, although the indorsement was without consideration. *Schwarzansky v. Averill*, 254
3. Knowledge on the part of the indorser that the maker intended to obtain credit with the payee by means of the indorsement, is not to be inferred from the fact that the indorser signed before the payee. *ib.*
4. Where, at the time of indorsement, the indorser (defendant) was informed by the maker that he had an arrangement with the payee (plaintiff), by which he could get certain stock if the defendant would indorse the note, and that such note was used to take up another note held by the plaintiff, on which the defendant was liable only as accommodation indorser. *Held*, sufficient evidence to show that the defendant indorsed the note as surety for the maker. *ib.*

BILL OF PARTICULARS.

1. Where the complaint alleged a retainer by the defendant of the

plaintiff as counsel and attorney at law, and attorney in fact to procure the release of certain property belonging to the defendant which had been seized and was detained by the Spanish Government, and an agreement that the plaintiff, upon the release of the property, should receive a specified compensation, and that the plaintiff had obtained the release of the property and demanded judgment for the amount specified in the agreement as such compensation: *Held*, that there was no ground for ordering a bill of particulars of the services performed by the plaintiff, since under the complaint the plaintiff would be entitled to recover upon proving the making of the agreement and the release of the property, and in case he failed to establish those facts, could not recover the value of such services as he had performed under his retainer as counsel and attorney at law. *Stilwell v. Hernandez*, 485

BONDS TAKEN *colore officii*.

1. Although by the Statute (1 R. S. 643, § 8), a bastardy bond is required to be taken from the putative father "to the people of this State, with good and sufficient sureties," yet if a bond with only one surety is accepted by the magistrate, the bond is not therefore void under the provisions of 2 R. S. 286, § 59, which provides that "no sheriff or other officer shall take any bond, obligation or security, by color of his office, in any other case or manner than such as are provided by law; and any such bond, obligation or security, taken otherwise than as herein directed, shall be void," and such a bond may be enforced against the principal and surety in it. The reason and intent of the Statute (2 R. S. 286, § 59) and the class of cases in which it is to be strictly construed, explained. Per CHARLES P. DAILY, Ch. J. *People v. Lyons*, 182

BURDEN OF PROOF.

1. In an action for such breach of the implied warranty of authority, after it appears that the defendant

assumed to act as agent for a third person, the burden of proof is not thereby cast on the defendant to show that he had actual authority to so act, but the burden is upon the plaintiff to show that he did not have such authority. *Noe v. Gregory*, 283

2. Where the complaint, in an action against a sheriff for damages for a false return of "not found" to an execution against the person, alleged that the action in which the execution issued was one in which an execution against the person would lawfully issue, and that an order of arrest had been issued therein, which was met by a denial of any knowledge or information sufficient to form a belief as to whether the execution had any force or vitality in law: *Held*, that the burden of proof was on the plaintiff to show the issuing of a valid execution against the person. *Josuez v. Conner*, 452

3. *It seems*, that if in such a case the plaintiff were to allege only that the execution directed the sheriff to take the body, etc., the fact that the action was one in which such execution could not lawfully issue, or that no order of arrest had issued therein, would have been matter of defense to have been pleaded and proved by the defendant. *ib.*

4. In such a case, if the action in which the execution against the body was issued was one in which such execution could not lawfully issue unless an order of arrest had been previously issued therein, the plaintiff must prove the issuing of such order. *ib.*

C

CERTIORARI

—when stays proceedings.

See PRACTICE, 1.

COMMON CARRIER.

1. Where the defendant received goods for transportation and gave a receipt which stated that the

goods were to be forwarded to the points to which a bill of lading should be given: *Held*, that the defendant was not liable for a loss of the goods occurring after the defendant had transported them over its own line of carriage and delivered them to a carrier having a connecting line on the route towards the place named as the address of the consignee of the goods. *Weil v. Merchants' Despatch Transportation Co.*, 456

2. Where the defendants were common carriers of freight and passengers by steamboat from New York City to Sag Harbor, L. I., and the plaintiff's trunk was delivered on board of their boat, marked with the plaintiff's name and "Sag Harbor, L. I.:" *Held*, that they were answerable for a failure to deliver it in the absence of evidence repelling the presumption of loss through their negligence, and that the defendants were not entitled to have the jury instructed that if the trunk was carried without any ticket being purchased by the plaintiff, she could not recover. *Flaherty v. Greenman*, 481
3. *Held*, further, that this question has been settled by the Court of Appeals in *Fairfax v. The N. Y. Central & Hudson River R. R. Co.* (67 N. Y. 11), and that therefore this court should not make an order, under L. 1874, c. 322, for the purpose of allowing the defendants to have the question reviewed by the Court of Appeals. *ib.*
4. *Held*, further, that although there was no allegation or admission in the pleadings that the defendants were carriers of freight (the allegation of the complaint being only that they were carriers of passengers and baggage), that the court on appeal might and would, on appeal, in order to sustain the judgment, conform the pleadings to the proof by allowing the complaint to be amended, by inserting such an allegation. *ib.*

CONSPIRACY.

1. The case of the *Master Stevedores*
Vol. VII.—37

Association v. Walsh (2 Daly, 1) as to the extent to which trades associations can legally go in controlling the rate of wages considered, and its authority said not to be affected by the act of 1870 (L. 1870, c. 19) concerning the peaceable assembling of workmen. *Sternack v. Brooks*, 142

CONSTABLE.

1. In order to justify a policeman in the city of New York in arresting a person without a warrant, or to justify one procuring such arrest, the act for which the arrest is made, whether it be regarded as constituting or tending to a breach of the peace, must be committed in the immediate presence of such officer. *Sternack v. Brooks*, 142

CONSTITUTIONAL LAW.

1. The jurisdiction conferred on the Superior City Courts by § 263, subd. 2 of the Code of Remedial Justice (L. 1876, c. 448) over certain transitory actions where the defendant is not a resident of the city where the court is located, and is not personally served with the summons therein, but the cause of action arose in that city, is such as may be conferred on such courts by the Legislature under art. VI., § 12, of the Constitution, providing for the continuance of such courts, with the jurisdiction they then severally had, and such further civil and criminal jurisdiction as might be conferred by law, and such extension of the jurisdiction of these courts beyond what they had at the time of the Constitution, is not such an extension of jurisdiction as has been declared unconstitutional by the Court of Appeals in the case of *Landers v. The Staten Island R. R. Co.* 53 N. Y. 450, and *Hoag v. Lamont*, 60 N. Y. 96. The case of *Toule v. Covert*, 11 Abb. Pr. N. S. 193, distinguished. *Gemp v. Pratt*, 197
2. In an action for the agreed price of goods sold and delivered to the defendant in the city of New York, —*Held*, that this court had jurisdiction, although the defendant

was a resident of Queen's county and was served with the summons there. *ib.*

CONTRACTS.

1. Where on the compromise of an action the defendant therein on his part gives his notes with an indorser, and the plaintiff on his part promises that on payment of the first of said notes he will give a release which upon payment of all the notes, and not until then, shall take effect, and that he will then discontinue without costs and will not bring other suits, &c., the obligations of the parties are *independent*, the promise is a good consideration for the notes, and a failure to give the release upon the payment of the first notes, especially if the release was not demanded, is not a good defense to an action brought on the last notes against the indorser by a person who took them for value before maturity with notice of the terms of the agreement in accordance with which they were made. *Bruce v. Carter*, 37

2. Where a benevolent association, organized under the general act for the incorporation of benevolent societies, provides by its constitution that upon the death of a member of the society each member thereof shall pay into the treasury of the society \$1, and that the sum thus realized shall be paid to the widow or minor children of the deceased member; the rights acquired by a person who becomes a member of the society while such a constitution is in force does not constitute a contract of insurance upon his life by the society, and in favor of the then wife of the member, under the statute (L. 1840, c. 80 ; L. 1858, c. 187) empowering a wife to insure the life of her husband, and the constitution of the society may afterwards be changed so as to make the sum payable to any one designated by the member in his lifetime, and the person so designated will then be entitled to the exclusion of the widow. *Durian v. The Central Verein of the Hermann's Söhne*, 108

3. A provision of the constitution of such a society requiring a member to designate the beneficiary whom he designs to have share in the benevolent fund at his death is sufficiently complied with by any form of words that is sufficient to clearly make known his intention, and the addition of the word "wife" to the name of the person designated, she not being his wife, does not make the designation ineffectual. *ib.*

4. When in a building contract the certificate of the architect that the building has been done in compliance with the contract is made a prerequisite of payment for such building, the architect is accepted by the contracting parties as an umpire, and neither party can avoid the effect of his certificate or refusal to give a certificate by the mere allegation that his certificate or refusal is unreasonable, nor can the parties litigate the matters thus submitted to him, until he is divested of his powers as umpire by death, incapacity, resignation or refusal to act. *Schenke v. Rowell*, 286

5. In an action to recover the contract price for the erection of a building, a complaint setting forth a contract which provided that payment should be made when the work was done according to the contract, approved of by the architect, and a certificate of performance given by the architect, and alleging that plaintiff performed the work according to contract, that the defendants accepted the work, and that the architect had unreasonably refused to give the certificate, is bad on demurrer, as not stating facts sufficient to constitute a cause of action. *ib.*

6. *Held*, further, that such complaint was defective in substance; that the mere allegation of complete performance of the work did not show a right of action, since there was no architect's certificate; that the failure of the complaint to show that the architect's certificate had been given was not remedied by an allegation that the certificate was unreasonably refused, and that the mere allegation that

the defendants had duly accepted the work, without the additional allegations that such work was a full compliance, and was received by the defendants as a full performance, did not remedy the omission of the complaint to show that such certificate had been given. *ib.*

7. The plaintiff received a sewing machine from the defendants under a written contract, by the terms of which she certified that she "hired it to use," and agreed to pay them a specified sum in advance, as security for its safe keeping, and to make monthly payments of an amount fixed, for twelve months thereafter, for the use of the machine, and upon default in any of the payments, to forfeit the machine and the security money. The contract also stipulated that she could at any time purchase the machine upon the payment of a sum, which added to the security money, and the monthly instalments, should amount to a certain price. The security money was paid, as well as six monthly instalments, when a default was made, and the machine taken by the defendants, whereupon she sued to recover back the amount of her several payments. *Held*, that she could not recover the amount of the instalments, nor (DALY, Ch. J., dissenting) the amount of the original deposit. *Haviland v. Johnson*, 297

8. Where a retiring partner, on being paid for the good-will of the business, agrees with the remaining partner not to engage in business in opposition to him so near as to take away his customers and injure his trade, the agreement only provides for a fair protection to the continuing partner, and is not void as against public policy. *Dethlefs v. Tumsen*, 354

9. Where such is the intent and meaning of an agreement of dissolution and sale of good-will, evidence showing that a new store of the retiring partner, opened by him in the same trade within two doors of the old stand, resembled the latter in outward appearance, is material in determining whether there has been a breach of that

agreement, and the amount of damage occasioned thereby. *ib.*

10. And in such an action the continuing partner, a party to the action, may testify in what amounts his monthly receipts fell off after the opening of the opposition store. *ib.*

11. Evidence of falling off in the receipts of the injured party, without specific proof of individual instances of loss of custom, is sufficient to warrant a jury in awarding damages. *ib.*

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVERSION.

1. Where the plaintiff had sold a sewing machine to the defendant's wife, to be paid for by certain instalments, and to be returned to the plaintiff in case such payments were not made, in an action against the defendant for the wrongful detention of the machine after a failure to pay certain of the instalments, proof of non-payment and of a formal demand for the machine on the defendant's wife (who did not refuse to deliver it), and that thereafter, in a conversation between the plaintiff's agent, who had made the demand on the defendant's wife and the defendant, about paying what was due on the machine, the defendant had said that he would not pay him, but would go to the office and pay: *Held*, no evidence of a wrongful detention or wrongful conversion of the machine by the defendant. *Howe Sewing Machine Co. v. Haupt*, 108

2. An action for the wrongful detention of goods, or for their value, will lie against the person receiving them from the fraudulent vendee with knowledge of the fraud, although such person may have parted with the goods before action brought. *Roberts v. Randel*, 3 Sand. 797, distinguished. *Meacham v. Collignon*, 402

CORPORATIONS.

1. The president of a manufacturing corporation, organized under the act of 1848, cannot lawfully bind it in the purchase of goods required in its business, when a resolution forbidding such act on his part exists, and appears on the books of the corporation, even if the seller of the goods had no notice of such resolution, unless through a well-recognized general course of dealing such president has been permitted and held out by the corporation as possessed of authority to make such purchases. *Westerfield v. Radde*, 326

— action will lie to compel transfer of stock on books of.

See ACTION, 3, 4.

COSTS.

1. Under Sec. 307 of the Code of Procedure (old) no more than ten dollars costs can be allowed for drawing interrogatories to annex to a commission, although more than one set of interrogatories may be drawn and annexed. *Johnson v. Chappell*, 43

COURTS.

Jurisdiction of Superior City Courts.

See CONSTITUTIONAL LAW.

COVENANT.

1. Where the plaintiff covenanted that she was seized in fee simple in her own right of certain land, and would convey the same to the defendant, free and clear of all incumbrances, and by a deed with full covenants, and the defendant by the same instrument covenanted to purchase the land at a fixed price, and to erect certain buildings thereon: *Held*, that these covenants were mutual and dependent, and that the plaintiff having deeded the land to a third person, this was such a breach of the covenants on her part as justified the defendant in refusing to perform those on his part. *James v. Burchell*, 531

D

DAMAGES.

See ASSESSMENT OF DAMAGES, CONTRACTS, 9, 10, 11.

LANDLORD AND TENANT, 3.

DISTRICT COURTS.

1. The statutes giving jurisdiction to District Courts in actions commenced by process of attachment must be strictly followed, or jurisdiction will not be acquired. *Solinger v. Patrick*, 408
2. An affidavit stating only that the defendant is indebted to the attaching creditor in a sum named "over and above all discounts," is insufficient to sustain the process, and both that and all subsequent proceedings are without jurisdiction. The affidavit should state the amount of the indebtedness "over all payments and set-offs." *ib.*
3. *It seems*, that such process of attachment, if issued against defendants, designating them by a fictitious name, would not give the justice jurisdiction. *ib.*

DIVORCE.

1. Alimony *pendente lite* will not be allowed unless the existence of the marital relation be proven to the satisfaction of the court. *Kinzey v. Kinzey*, 400
2. In an action by a husband for an absolute divorce on the ground that at the time the marriage was contracted his wife had a husband then living and had fraudulently concealed that fact from him, the court refused to allow the wife alimony *pendente lite* where it appeared that she had had a husband prior to her marriage with the plaintiff, and had obtained a limited divorce from him on the ground of abandonment shortly prior to her marriage with the plaintiff; and although the wife swore that she had no knowledge

of the whereabouts of her first husband, and had not heard of or from him for some nine years prior to her marriage with the plaintiff, yet the court held that the fact of her having obtained the divorce showed that she could not have believed her former husband to be dead,—which prevented her from taking advantage of the statute (2 R. S. 139 § 6) providing that “if any person whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the life of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent jurisdiction.” *ib.*

DOMICILE.

See RESIDENCE.

E

ELEEMOSYNARY CORPORATIONS.

1. The New York Juvenile Guardian Society, organized under the General Act of April 12th, 1848, for the incorporation of benevolent, charitable and missionary societies—the objects of its incorporation being to provide instruction, homes, clothing, temporary board, and free Christian schools (not denominational) in destitute districts in the city of New York for neglected children,—is subject to the visitation and examination of the Board of State Commissioners of Public Charities, in accordance with the powers and duties conferred on them by L. 1873, c. 571, § 4, in regard to any charitable, eleemosynary, correctional or reformatory institutions of this State (excepting prisons), whether receiving State aid or maintained by municipalities or otherwise. *New York Juvenile Guardian Society v. Roosevelt*, 188
2. The examinations and inspections made by the Board of State Com-

missioners of Public Charities are not in the nature of an action or proceeding against the institutions examined, and the commissioners are not obliged to conduct them according to the forms of a civil or criminal action or proceeding; the examination may be secret and not based on any specific charges, nor confined to any particular points, and the institution examined is not entitled to notice of the course the examination is to take, or to have notice of what is done, or to be present by its officers or counsel at the taking of testimony, or to cross-examine the witness produced or to introduce witnesses. *ib.*

EQUITABLE LIEN.

1. Where the plaintiffs had been induced to execute a bond of indemnity to secure from loss the sureties in a bond given to release an attachment on a stock of goods belonging to a business firm upon the promise that the goods so released should be held for the plaintiff's indemnity and security against loss: *Held*, that the plaintiffs had an equitable lien on such stock of goods for the amount they had been legally compelled to pay by reason of the bond of indemnity. *Arnold v. Morris*, 498
2. *Held*, further, that such lien could be enforced as against the general assignee of the firm for the benefit of their creditors. *ib.*
3. *Held*, further, that although an agreement that the firm might make sales from such stock of goods and purchase others to replace those sold, and that those so purchased might in their turn be sold and their place supplied by others, the plaintiffs' lien to open and shut, to set out and take in such goods, would make the agreement void as against creditors, or the assignee as their representative, yet that such an agreement was not established by evidence that the firm had promised to keep the stock of goods “replenished” up to its then value, and that the agreement must be construed according to the positive promise of

the firm to "hold the goods" for the plaintiffs' indemnity or security, without considering the additional promise as to replenishing the stock. *ib.*

4. *Held*, further, that under the agreement as thus construed, if the firm, without the plaintiffs' consent or knowledge, disposed of parts of the stock and put in other stock to supply its place, that the latter mingled with the former and became subject to the plaintiffs' lien. *ib.*

5. *Held*, further, that the active members of the firm had authority, without the knowledge of a dormant partner, to create such a lien on the firm property when it was done for the benefit of the firm and to relieve the firm property from attachment. *ib.*

6. *Held*, further, that in an action to establish the plaintiffs' lien on such goods the dormant partner was not a necessary party. *ib.*

EVIDENCE.

1. It is error to admit parol evidence of matters appearing of record to show that a title to land is defective, and in a case where the introduction of such evidence tends to discredit with the jury the testimony for the party objecting, such error is not cured by charging the jury to disregard such evidence. *Allen v. James*, 13

2. Evidence that the title to land is defective, is not relevant in an action by a broker for services in procuring a purchaser for the land where the issue is whether or not the broker was employed, and where it is not disputed that the purchaser procured by the broker, entered into a contract for the purchase of the land. *ib.*

3. In an action for conversion of second-hand furniture, the testimony of plaintiff alone as to its value, he not being shown to be an expert and testifying only that he had purchased and knew the original cost of a part of the articles, and that in his opinion one-

third off original cost was their value, is insufficient evidence to sustain a finding of the value of the property converted. *Imhorst v. Burke*, 54

4. There is no rule of law that requires, in a civil action in which the issues are such that a determination adverse to a party will be an adjudication of the fact that he has committed a crime, the same amount and conclusiveness of evidence as would be required to find the party guilty upon an indictment for that crime. Per *VAN HOESEN, J. Davis v. Davis*, 313

5. Admissions made by a party to an action of a fact within his knowledge and adverse to his interest are strong evidence and conclusive, unless there is other evidence in the case qualifying the admissions, or showing that they are erroneous; but the testimony of a witness that he has heard a party to the action make such admissions is weak and inconclusive evidence. *ib.*

6. The best evidence of the fact that an order of arrest has issued in an action is the order itself. *Josuez v. Conner*, 452

7. Secondary evidence to establish that fact will not be allowed, unless it is sufficiently shown that the original order is lost or destroyed. *ib.*

8. Where the evidence showed that when the order was last seen it was in the hands of a judge of the court from which it issued, that the judge had since died, that the plaintiff's attorney had searched, as he testified, "with great care" the files and indices of the clerk's office and had not found the order, that it should be there, and that he did not know where it was: *Held*, that the loss or destruction of the order had not been sufficiently shown. *ib.*

—when judgment in Equity case will not be reversed for admission of irrelevant evidence.

See APPEAL, 1.

—when question whether verdict was rendered against the weight of or on insufficient evidence will not be considered on appeal.

See APPEAL, 2.

EXAMINATION OF ADVERSE PARTY BEFORE TRIAL.

1. The right of a party under § 391 of the (old) Code of Procedure to examine his adversary before trial, is not absolute, and such an examination will not be allowed in a case where, by the established rule before the Code, a bill for a discovery would not have been sustained in equity. *Phœnix v. Dupuy*, 238
2. The rule in equity was, that a party could not be compelled to discover any matter which might subject him to a penalty, a forfeiture, or a criminal prosecution, and accordingly *held* that a defendant could not, under § 391 of the (old) Code of Procedure, be examined as to whether he had published an alleged libel against the plaintiff. *ib.*
3. The practice in equity as to bills of discovery and the various constructions placed upon § 391 of the Code reviewed. Per CHARLES P. DALY, Chief Justice. *ib.*
4. The decisions upon the construction of §§ 390, 391 of the old Code of Procedure, as to what must be shown to sustain an order for the examination of an adverse party before trial, are not applicable to the construction of the provisions of § 870 *et seq.* of the new Code of Procedure. *Hynes v. McDermott*, 513
5. Under the new Code of Procedure, a party applying for the examination of an adverse party before trial need not show such facts as would have sustained a bill for a discovery in equity, and the rules applicable to bills of discovery do not apply to such applications. *ib.*
6. Where the applicant presents an affidavit setting forth the facts prescribed by § 872 of the new Code of Procedure, he is entitled

to an order for the examination of an adverse party as a matter of right. *ib.*

F.

FACTORS.

See ARREST & BAIL, 2, 5, 6.

BAILMENTS, 8, 9, 10.

FALSE RETURN.

See BURDEN OF PROOF, 2, 3, 4.

FORMER JUDGMENT.

1. A party to certain suits in this court having applied for a substitution of attorneys, an order of reference was made to take testimony and report the same with his opinion as to whether such substitution should be ordered, and if so upon what terms. A large amount of testimony was taken before the referee as to the amount, nature and value of the services of the attorneys sought to be removed, and the referee made his report advising that the substitution should be ordered upon certain payments being made and security given by the party applying therefor. After this report had been filed the applicant prayed leave to withdraw his application for a substitution and to have the report vacated upon such terms as to payment of costs as should be just. *Held*, that under the circumstances, the application should be denied; that the applicant having invoked the jurisdiction of the court over the dispute between himself and his attorney and litigated on the reference the amount due from him to his attorneys, he should not be allowed to escape the effect of the court's decision on that point; that the report should be confirmed so far as it was found correct, in order that the attorneys might have the benefit of such force as it might have as evidence in any suit between themselves and the applicant to recover for the services rendered by them in the suits in which they

were sought to be removed. *Matter of Davis*, 1

2. Where the plaintiffs in a proceeding against the owner and contractor to foreclose mechanics' liens on a building towards the erection of which they had furnished work and materials, pleaded that they had furnished such work and materials under a sub-contract with the contractor :—*Held*, that the judgment on that proceeding adjudicating that the plaintiffs had furnished such work and materials at the request of the contractor was a bar to a subsequent action by them against the owner to recover for furnishing the same work and materials upon the allegation that they had been furnished at the owner's request. *Toope v. Prigge*, 208

3. A judgment for the plaintiff in an action for salary for the month of January, 1871, under an allegation of a hiring for a year, from January 1st, 1871 :—*Held*, not to estop the defendant, in a subsequent action for salary for months subsequent to January, 1871, from showing that the plaintiff had been discharged by him during the month of January, 1871, and had not thereafter rendered any services to the defendant, or made any tender of any. *Weed v. Burt*, 267

FORFEITED RECOGNIZANCE.

1. The judgment entered on a forfeited recognizance will be vacated where, after the forfeiture of the recognizance, the surety has been prevented from retaking and surrendering his principal by the death of the principal ; upon the usual terms of payment of any costs that may have been incurred by the People in entering the judgment. *People v. Wissig*, 23
2. The jurisdiction of this court as to judgments upon forfeited recognizances, and the statutes upon the subject considered. Per CHARLES P. DALY, Chief Justice. *People v. Devlin*, 47

FRAUD.

1. Where to a complaint for a balance of the contract price of goods

sold and delivered, the answer confesses the cause of action and sets up the defense that plaintiffs under a composition agreement, had agreed to receive and had received 50 per cent. as full payment, the plaintiffs may prove in avoidance of the composition agreement, that it was fraudulently procured by the defendants. *Smith v. Salomon*, 216

2. When a creditor's signature to a composition agreement has been obtained by fraud on the part of the debtor, the creditor may, upon the discovery of the fraud, although he has received under the composition agreement the amount therein specified to be in full payment of his debt, maintain an action on the original cause of action for the unpaid balance, without first bringing an equitable action to set aside the composition agreement as fraudulent, and without having first restored or offered to restore the amount received under such agreement. *ib.*

3. Evidence that the defendant, to induce plaintiff to sign the composition agreement, had represented to him that the assets of the firm would not pay more than 50 cents on the dollar ; that in fact a surplus remained after that payment, that the defendant had confessed that he had secreted goods and kept two sets of books, one of which was afterwards destroyed, is sufficient to raise the question for the jury of whether or not the composition agreement was obtained from plaintiff by fraud. Per CHARLES P. DALY, Ch. J. *ib.*

4. Where the defendant was a creditor to a large amount of his nephew, who was engaged in buying goods on credit and shipping them to Europe for resale, and the nephew had no funds of his own but relied for funds to pay for the goods he purchased, on money advanced to him by the defendant, in whose name the bills of lading were taken, and after a number of such purchases, shipments and advances by the defendant had been made and there had been a loss on the shipments so that the defendant had not received back

his advances in full, a large quantity of goods were purchased on credit and shipped and the bills of lading made out to the defendant, who made no advances thereon but collected the proceeds of sale and applied them to the balance due for former advances and on account of an old debt due to him from his nephew. *Held*, that these facts were sufficient to show that the defendant's nephew bought the goods with the fraudulent design of never paying for them, and that the defendant had knowledge thereof. *Meacham v. Collignon*, 402

5. Where the third party receiving goods has guilty knowledge of the fraud by which they were obtained, no notice of rescission of the sale need be given him by the person defrauded before action brought; a simple demand for the goods is sufficient. *ib.*

FRAUDS, STATUTE OF.

1. Where the defendant, at the close of plaintiff's case, without any cross-examination of plaintiff's only witness, and without offering any evidence in defense, requests the court to direct a verdict for the defendant, he admits the facts testified to and all facts which may reasonably be inferred from them, and in such a case, where the only evidence to prove a sale and delivery was, that plaintiff's clerk, who knew defendant, sold him four chandeliers at the price of \$150, that he made a deduction of 10 per cent. in consideration of cash, which was to have been paid as soon as they were put up, that the amount was \$180, that the chandeliers were delivered and were not paid for, it will be inferred that the defendant saw the chandeliers, that they were put up, that defendant made no objection to them, and such inferences being made in this case, it was *Held* that there was an acceptance within the meaning of the Statute of Frauds. *The United States Reflector Co. v. Rushton*, 410
2. The authorities upon the subject of receipt and acceptance under

the Statute of Frauds, collated and considered. Per CHARLES P. DALY, Chief Justice. *ib.*

3. Where the owner of land subject to an over-due mortgage made by a former owner made an oral agreement with the holder of the bond and mortgage to the effect that if he would extend the time of payment, and forbear to foreclose, he would pay him the amount of certain interest on the bond, partly then due, and partly to become due within the extended time: *Held*, that the agreement was not void under the Statute of Frauds, as a promise not in writing to answer for the debt or default of another, but was an original and valid agreement on a new and sufficient consideration. *Prime v. Koehler*, 345
4. The case of *Doolittle v. Naylor* (2 Bosw. 208), to the contrary, disapproved. *ib.*

FRAUDULENT CONVEYANCE.

1. When in an action to recover the proceeds of goods sold under a chattel mortgage alleged to have been given in fraud of creditors, the plaintiff has given evidence of uninterrupted possession and disposal of the mortgaged chattels by the mortgagor, *Held*, that the statutory presumption of fraud is raised, and a motion to dismiss the complaint on the ground that as respects the issue of fraud, no cause of action has been established, should be denied, and *Held*, also, that it is not error in such an action to charge, that if the mortgage was not fraudulent and defendants, the mortgagees, knew of sales of the chattels being made but supposed the proceeds were to be applied to the payment of their debts, they were entitled to a verdict; but if the jury found the converse of those facts, the plaintiff would be so entitled. *Southard v. Benner*, 40
2. The purchaser, at a sale under an execution, of chattels subject to a mortgage, has the same right to attack the validity of the mortgage as is possessed by the execu-

tion creditor, unless the chattels are sold expressly subject to the mortgage. *Wayner v. Jones*, 375

3. Where a chattel mortgage obviously contemplates, though it does not expressly provide for the consumption of some of the mortgaged chattels by the mortgagor, in the manufacture of beer, the sale of the beer, the use of the proceeds in the business of the mortgagor, the purchase of other chattels to replace those consumed, the continuance of the mortgagor in possession until a breach of condition, and contains a provision that the mortgage covers the chattels to be purchased, it is void as against a creditor of the mortgagor or those succeeding to his rights. *ib.*

4. Where after a levy and sale by the sheriff of personal property of an execution debtor which before the sale is kept and used by the debtor in his own name on the premises where he resides, that property after the sale remains in the same premises still occupied by the debtor, and is used and controlled by him in all respects as before, except that after the sale he acts as agent of the purchaser at the execution sale: *Held*, that the change of possession is constructive and not actual, and the sale is, under the Statute of Frauds, presumptively fraudulent as against creditors of the person whose property is thus sold. *Betz v. Conner*, 550

5. The fact that the sale is made by the sheriff under a valid execution, instead of being made directly by the execution debtor to the vendee, makes no difference in the application of that statute. *ib.*

G

GUARANTY.

1. In an action upon a contract indorsed upon a money bond and expressed in these words: "I expressly guarantee the *ultimate* payment of the sum named herein, together with interest and all lawful charges, or so much thereof

as shall be due and owing": *Held*, that the contract intended a liability only upon default of the principal debtor, and that a complaint on the contract not setting forth a demand on the principal debtor, his default, and notice to the defendant, was bad on demurrer. *Hernandez v. Stilwell*, 360

2. An obligation, where the word "guaranty" is used, may be construed as an original and absolute one, but not unless it is plain that such was the intention of the parties. *ib.*

GUARDIAN AD LITEM.

—when and how compellable to give security for costs.

See SECURITY FOR COSTS.

H

HUSBAND AND WIFE.

- 1 Where the defendant had sent his wife and children to live with the plaintiff, and had then demanded the children from his wife, who had (to the plaintiff's knowledge) refused to deliver them up, and the defendant had thereafter sued out a writ of *habeas corpus* for his children, and in those proceedings his attorneys had agreed that until the termination of the proceedings the children should remain in the custody of the wife: *Held*, that although the refusal to surrender the children to the defendant would otherwise have prevented his liability for necessities supplied to them thereafter, yet his subsequent consent that they should remain in the custody of the mother until the termination of the *habeas corpus* proceedings continued his liability therefor to the plaintiff for necessities furnished them while in the custody of their mother until such proceedings were terminated. *Grunhut v. Rosenstein*, 164

2. Where the defendant's children, who were living with their mother (the defendant's wife), from whom

he had separated himself, were of the ages of twelve, nine, and eight years, and were in ordinary health and attended school daily and the defendant's wife was able to take care of them, had she chosen to do so, and the defendant was a man of small means: *Held*, that under these circumstances, a nurse for the children was not necessary, and that the plaintiff who had paid the wages of such a nurse could not recover the same from the defendant. *ib.*

I

INJUNCTION.

1. An injunction against the maintenance of a structure which is a common nuisance, will not be granted at the suit of a party not suffering or in danger of suffering any injury other or greater than all other persons suffer and are likely to suffer from the same nuisance. *Ninth Ave. R. Co. v. New York Elevated R. Co.*, 174
2. Nor for an injury arising from negligence not the ordinary and necessary result of the use of the road. *ib.*
3. Nor even if the private party asking for the injunction shows that he has suffered, or is in danger of suffering an injury, other and greater than the rest of the community, will an injunction be granted unless it appears that the injury existing or threatened is of a serious or irreparable character, and there has been diligence in applying. *ib.*

INSURANCE.

1. A parol contract of insurance made by an incorporated fire insurance company, the charter of which does not limit its powers of insuring to written policies, is valid. *Cooke v. Aetna Ins. Co.*, 555
2. If the provisions of its charter are that it may insure, and that all policies shall be subscribed and countersigned by certain of its offi-

cers, it still has power to make a parol contract of insurance. *ib.*

3. A parol agreement to insure certain property in a certain building for a certain term from date and for a certain amount, although the rate of premium is left uncertain and to be fixed by the company after inspection of the building, is a complete contract of insurance, and the company will be bound for a loss occurring thereafter in the term and before the rate of premium has been communicated to the assured. *ib.*

L

LANDLORD AND TENANT.

1. Where the plaintiff had orally leased premises to the defendant for the term of a year, and afterwards an agent of the plaintiff's for collecting rent, collected a month's rent in advance and gave a receipt therefor, which stated that the letting was for a month only and that the term would expire on the first of the next month, and the plaintiff had received the rent so collected, but had given no authority to the agent to give such a receipt:—*Held*, the clause in the receipt as to letting for a month was not a rescision of the yearly renting and a new letting for a month under which the defendant would have a right to quit the premises at the end of that month and avoid payment of further rent. *Davidson v. Blumor*, 205
2. Where the defendant was the proprietor of a building used and let as a market, and leased to the plaintiff "stand No. 46" in such market, and afterwards discontinued the use of the building as a market, induced the other tenants to surrender their stands, extinguished the lights of the market, except those at the plaintiff's stand, and closed the doors of the market, except the one in front of the plaintiff's stand,—*Held*, that he was guilty of an eviction of the plaintiff from the premises leased him. *Denison v. Ford*, 384
3. *It seems*, that in such a case the

measure of damages for the eviction would be the difference between the rent reserved in the lease and the value of the premises after the eviction, together with the rent paid in advance. *ib.*

4. *It seems*, that in tenancies from month to month or at will, the service of a written notice to terminate the tenancy by delivery at the place of business of the tenant, he not being present, is not a sufficient service under 1. Rev. Stat. 745, §§ 7 and 8. *Banks v. Carter*, 421

5. *It seems*, that in tenancies from month to month the thirty days of notice does not run from the day of service, but the statute requires the service to be made thirty days before the expiration of a month of tenancy; thus, notice served on the 25th of April would terminate the tenancy on the 26th of May, the latter day being the end of a month of tenancy, *i. e.*, the day when the monthly rent is payable. *ib.*

6. While the law is well settled in this State, that where a tenant for a year or more holds over the term the landlord has the option to treat him as a trespasser, or as a tenant for another year upon the same terms as of those of the lease under which he had been occupying the premises; yet every continued occupation of the premises after the expiration of the term is not a holding over within this rule, and where upon the evidence it is not clear as to whether the tenant was not, with the consent of the landlord, remaining only pending negotiations for a new lease, with the understanding that in case a new lease was not made the tenant should surrender the premises and not be liable for any rent thereafter, the question of whether or not there was a holding over should be submitted to the jury. *Smith v. Allt*, 492

LIBEL.

The Constitution of this State having provided in Art. 1, Sec. 8, that "every citizen may freely speak,

write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press," a court of equity has not jurisdiction to restrain the publication of libellous matter. *New York Juvenile Guardian Society v. Roosevelt*, 188

LIFE INSURANCE.

1. Where the plaintiff, being in arrears for premiums due on his policy of insurance with the defendant company, surrendered his policy and received a "paid-up policy," and at the same time gave an interest-bearing note for the past due and unpaid premiums on his old policy, which note was made a lien upon the paid-up policy, and it was also made a condition of the contract for the surrender of the old and the issuing of the new policy that if the interest or any part of the principal of his note was not paid when due, that then the policy should become void without notice. — *Held*, that the plaintiff was not entitled to notice of the time when the interest on the note fell due (even though it was the continuous practice of the company to give notice in such cases), and that his failure to pay the interest when due worked a forfeiture of the policy, against which a court of equity would not give relief. *Heim v. The Metropolitan Life Insurance Co.*, 536
2. *Held*, further, that the fact that the plaintiff supposed that the policy, being called a "paid-up policy," required no further payments to keep it in force, was no ground for relieving him, no fraud or mutual mistake being shown. *ib.*
3. Where the insured, being about to give up a policy of insurance upon his own life, was told by the defendant's president that if he would keep it alive and could not make payment of the premiums when due, that the company would give him whatever accommodation was necessary, and

the insured thereupon abandoned his intention of giving up his policy, and for seven years thereafter the defendant received the premiums after they were due. *Held*, 1. That although the policy provided that it should continue in force only so long as the annual premiums were paid when due, yet this was a condition that might be waived by parol. 2. That the authority of the president to waive such condition would be inferred in the absence of any evidence to the contrary. 3. That the receipt by the company for seven years of the premiums after the day on which they were due, and when the company might have enforced a forfeiture, was an approval and ratification of the act of the president in waiving such condition. *Dilleber v. The Knickerbocker Life In. Co.*, 540

—when policyholder may maintain action to determine amount of dividends due and to compel company to go on and transact business notwithstanding appointment of receiver. See Action, 1, 3.

LIMITATIONS. (STATUTE OF)

1. Under § 100 of the (old) Code of Procedure, as amended in 1851 (and before the amendment of 1867), both departure from and residence out of the State were necessary to suspend the running of the statute of limitations. *Belknap v. Sickles*, 249
2. The amendment of 1867 (L. 1867, c. 781) creating an additional exception, where a party should remain continuously absent from the State for one year or more, was not retrospective, and did not operate to revive claims which, under the statute as it stood previous thereto, were then already barred. *ib.*
3. Where, therefore, a complaint, anticipating the defense of the statute of limitations, alleged the defendant's departure from and residence out of this State for certain years prior to 1867, and the defendant answered that during

those years he had resided in this State, and had not been absent from it except for limited periods. *Held*, that the defendant should not be compelled to make his answer more definite and certain by stating the time of such absences and for what periods they continued. *ib.*

LUNATICS.

1. There is no rule of law excluding the heirs or next of kin of a lunatic from being appointed committee of his person and property, although the court will exercise circumspection and care in appointing those who might be benefited by the lunatic's death, and who would have an interest in accumulating the income of his estate. *Matter of Page*, 155
2. The court selects the committee with the view of doing what in that particular case is best for the lunatic, keeping in view the possibility of his recovery; and does not recognize any absolute preference of relatives to strangers or of strangers to relatives. *ib.*
3. The report of a referee, to whom it has been referred, to inquire and report a proper person or persons to be the committee of a lunatic, should not be confirmed where it appears to the court that the referee has exercised no discretion in his selection between the only two persons proposed, but has reported one for nomination on the erroneous supposition that the other was, as a matter of law, excluded from appointment, but the matter should it be referred back to him for the exercise of that discretion. The opinion *In the Matter of Owens*, 5 Daly, 288, explained; by CHARLES P. DALY, Chief Justice. *ib.*

M

MALICIOUS PROSECUTION.

1. In such an action, where the malicious prosecution complained of was the arrest on a criminal charge and the bringing of plaintiff before a magistrate, evidence that upon his examination before

the magistrate the plaintiff executed a recognizance to appear before the Court of General Sessions, and that in such recognizance it was recited that there appeared to the justice to be probable cause to believe the plaintiff guilty, does not establish conclusively that the magistrate lost jurisdiction of the proceedings, or that there was probable cause, if there is also evidence that the recognizance was not intended to remove the proceedings; that the examination proceeded before the magistrate, and that the plaintiff was discharged. *Van De Wiele v. Callanan*, 386

MANDAMUS.

A writ of mandamus will not be granted to compel a justice of a District Court in the city of New York to insert in a judgment already rendered by him a statement that the defendant against whom it is rendered is subject to arrest and imprisonment, since the entry of the judgment required by the facts of the case is a judicial and not a ministerial act; and the remedy for a failure of the justice to enter the proper judgment is by appeal; and since, also, the justice after having entered the judgment is *functus officio*, and a subsequent entry on his docket to the effect that the defendant was subject to arrest and imprisonment would be void. *People ex. rel. Coles, v. Callahan*, 434

MANUFACTURING CORPORATION.

1. In an action against a stockholder of a corporation organized under the Manufacturing Companies' act of 1848, for wages due a servant from the corporation, the complaint must contain allegations showing that the sum contracted to be paid was, by the terms of the contract, payable within twelve months from the time of the contracting of the debt. *Hill v. Conkling*, 397
2. In such an action a complaint stating only that plaintiff "was a servant and laborer of such cor-

poration between the 15th day of June, 1874, and the 29th day of January, 1876, and in that capacity rendered services to said corporation, and which services were reasonably worth, and the said corporation agreed to pay the plaintiff therefor, the sum of \$246 07, which sum became due and owing this plaintiff by said corporation on the said 29th day of January, 1876," is insufficient on demurrer as not stating facts sufficient to form a cause of action. *ib.*

MARINE COURT.

1. Under the Act of 1872 (L. 1872, c. 629, § 8), providing that a judgment of the Marine Court of the city of New York, for the sum of twenty-five dollars, or over, exclusive of costs, "the transcript whereof is docketed in the office of the clerk of the city and county of New York;"—after a transcript of such a judgment has been so docketed an execution on the judgment must be issued from the Court of Common Pleas and cannot be issued from the Marine Court, and an execution theretofore issued out of the Marine Court, becomes upon the docketing of such transcript inoperative, and in case the judgment debtor's property is subsequently seized thereunder, the persons directing or joining in the seizure with knowledge of the docketing of the transcript, are liable as trespassers. *Oberwarth v. McLean*, 70

Quære, whether the marshal, if ignorant of the docketing of the transcript, would be protected as to his acts under the executions subsequent to the docketing. *ib.*

2. The act of 1872 (L. 1872, p. 1495, § 11), giving the Marine Court of the city of New York jurisdiction of an action on the official bond of a marshal upon leave being first granted by a justice of that court, does not repeal the provisions of the act of 1862 (L. 1862, c. 484, p. 971, *et seq.*) giving a justice of the Court of Common Pleas power to allow the marshal's bond to be prosecuted in the name of the parties aggrieved. The remedies un-

der the two acts are different, and either may be resorted to. *Hauger v. Bernstein*, 340

—when judgment reversed for excessive damages, on appeal to this court, although no motion for a new trial has been made.

See APPEAL 8.

MARRIAGE.

1. It is a general and universal law that all that is essential to constitute a marriage between parties competent to contract it, is their mutual consent to enter into the martial relation. This consent must be clearly expressed and made known, but no particular ceremony or form of words, or cohabitation is essential to constitute the marriage. This general law will be presumed to be the law of any civilized country until a qualifying or restrictive law of that country is shown. *Davis v. Davis*, 308
2. Where a form or ceremony of marriage, has been proven, it is *prima facie* evidence of marriage, and the burden of proof to show that the form or ceremony did not include the necessary elements to constitute a marriage is upon the party disputing the marriage. *ib.*

MARSHAL.

1. Where the condition of the official bond of a marshal was, that he should "well and faithfully execute the duties of said office of marshal without fraud, oppression or deceit,"—*Held*, that allegations that the marshal, under an attachment against another person, seized property of plaintiff; that plaintiff obtained judgment of recovery and for damages; and that an execution on the judgment issued against the marshal was returned unsatisfied, constituted a sufficient assignment of a breach of the bond. *Hauger v. Bernstein*, 340
2. In an action against the sureties on the official bond of a marshal of the city of New York, where

the alleged breach of the bond is misconduct of the marshal, in levying upon the goods of one person under an execution against another, the judgment in an action by the party whose goods were taken against the marshal for the unlawful taking may be given in evidence although the record does not show that the judgment was recovered against him as a marshal, or for misconduct in his office. Such conduct is material to prove the act of taking, and parol evidence *dehors* the record may be given to show the grounds of the judgment, and that the act was done *colore officii*. *The Mayor, &c. v. Ryan*, 440

MASTER AND SERVANT.

1. When a servant, hired for a definite term has been wrongfully discharged, before the expiration of the term, he cannot sue for wages for the period subsequent to his discharge, but his remedy is by an action for damages for breach of the contract of hiring. *Weed v. Burt*, 267
2. A master may, before the expiration of a term of hiring, discharge his servant for bringing actions for instalments of wages, in one of which actions it is decided that the instalments claimed therein, and consequently those claimed in the other actions, are not yet due, and for talking of these actions with the servants and members of firms of merchants competing in business with his master, and such discharge will not render the master liable for damages for breach of the contract of hiring. *Brink v. Fay*, 502
3. If the servant, through thoughtlessness, and with a disregard of consequences to his master, does what is likely to work substantial injury to his master, the latter may discharge him and terminate the hiring. *ib.*
4. *It seems*, that for a servant, while still in the employ of his master, to state to rivals of his master in business that he, the servant, has actions in Court pending against his master for unpaid instalments

of wages, is conduct tending to injure the master's credit, and is inconsistent with the duties a servant owes to his master. *ib.*

MECHANICS' LIEN.

1. In proceedings to enforce mechanics' liens, a sub-contractor is not estopped from asserting his lien as against the owner by reason of the fact that the owner was induced to employ a certain contractor to build, by parol statements of such sub-contractor, that the contractor was responsible, and that if he was employed, he, the sub-contractor, would be responsible that the contractor would so perform his contract that no liens would be filed, such agreement being void, not being, under the Statute, in writing, and there being nothing in it that operated by way of estoppel. *Abham v. Boyd*, 30
2. Under the Mechanics' Lien Act, applicable to the City of New York (L. 1863, c. 500), as amended in 1866 (L. 1866, c. 752), labor done on premises in pursuance of a contract with a prior owner, cannot be the subject of lien as against a succeeding owner, and unless such lien had already been imposed before any transfer of the title is effected by deed or operation of law, any proceedings thereafter instituted under the act are entirely ineffectual, even to afford any right to a personal judgment between any of the parties to the contract. *Meyers v. Rennett*, 471
3. Where, therefore, an owner of property in New York City made a contract for the erection of a building thereon, and before the work was completed died, having devised the property in trust, and the contractor, under the direction of the trustee (who was also executor of the deceased), proceeded with the work according to the contract.—*Held*, that the filing of notices, after the death of the owner, in accordance with the provisions of the act, did not create any lien upon the trust estate, and that in proceedings

to foreclose the liens claimed to have been acquired by the filing of such notices, a personal judgment could not be rendered against the trustee. *ib.*

MISTAKE.

When the defendant, having been applied to become surety on a lease, stated to the plaintiff's agent that he wanted a clause inserted in the agreement of suretyship, providing that he should have fifteen days' notice of non-payment, to which the agent agreed, and the defendant afterwards instructed his book-keeper to insert a clause providing that he should have notice within fifteen days after non-payment, and the book-keeper thereupon inserted a clause requiring "fifteen days' notice of non-payment, or proof of demand being made," and the defendant, without noticing that the clause was not drawn according to his instructions to his book-keeper, delivered the agreement, and the plaintiff thereupon put the tenant in possession of the premises, neither he nor his agent having any knowledge of what had passed between the defendant and his book-keeper.—*Held*, that there was no mutual mistake of fact which would warrant the reformation of the instrument, so as to make it require notice to the defendant within fifteen days after non-payment of the rent. *White v. Meyer*, 428

MONEY HAD AND RECEIVED.

1. Where the plaintiff had exported certain goods which he had purchased from the defendant, viz., oil in cans, and the defendant had acted as agent for the plaintiff in shipping it, and had shipped it and entered it at the Custom House for the drawbacks allowed on the cans, under U. S. Rev. Stat., § 3015, *et seq.*, in the name of the defendant, and in that name received the debentures given under the treasury regulations for the drawback. *Held*, that the plaintiff being the exporter was entitled to the drawback under

the statute and the treasury regulations made thereunder, and could treat the defendant as his agent in entering the goods for the drawback and receiving the debentures therefor, and collecting the money thereon, and could maintain an action against the defendant for the money so collected. *Lake v. The Devos Manufacturing Co.*, 161

2. *Held*, further, that by making delivery to the defendant of the certificate issued under the treasury regulations by the collector of the port from which the goods were exported to the "exporter or his agent," showing the right to the drawback (and by which the defendant secured the issuing to it of the debentures, and the cancellation of the bond given by it under U. S. Rev. Stat., § 3042, on such entry of the goods for exportation), and by bringing a suit against the defendant to recover from it the money received by it on the debentures, the plaintiff ratified all the acts of the defendant in entering the goods, and could not claim the drawback from the government, and that this case was therefore distinguishable from *Butterworth v. Gould* (41 N. Y. 480) and *Patrick v. Melcalf* (37 N. Y. 332). *ib.*

MUNICIPAL CORPORATION.

1. The duty of the corporation of the city of New York to keep the streets of the city free from snow and ice is not absolute and unqualified, and where an unusually large fall of snow occurs, the corporation will not, if it exercise reasonable diligence in removing it, be held liable where an accident occurs by reason of snow or ice not yet removed. *Battersby v. The Mayor*, 16
2. Where it appeared by the plaintiff's evidence that he had, in crossing a street in the city of New York, stepped upon a pile of mud, and had fallen, his foot slipping upon some slippery substance, supposed to have been ice, and it also appeared that the snow had fallen in unusually large quantities in

the winter when the accident occurred, that there had been a very large snow-storm a few days before the accident, and also that during that winter the corporation had employed men almost every other day in cleaning the street. *Held*, that this evidence failed to show a case of negligence for which the city was responsible. *ib.*

3. The Corporation of the city of New York is not liable to pay interest on interest-bearing claims against it for the period between the time when by their terms they become due and the time when payment is demanded; and the rule as to a private debtor, that to stop interest he must seek and make tender to his creditor, does not apply to a municipality. *Paul v. The Mayor*, 144

N

NEGLIGENCE.

1. An action for an injury inflicted by the bite of a vicious dog, which the owner, with a knowledge of its propensities, suffers to go at large, is not founded upon the ordinary liability for negligence; but upon the ground that to harbor such an animal and allow him to go freely about or in the public thoroughfare, shows such a disregard for the safety and lives of others as to partake of the character of a willful wrong, which, in itself, constitutes the cause of action for the injury inflicted by the animal. *Lynch v. McNally*, 126
2. In such an action, therefore, no such defense can arise to defeat the action, as contributory or co-operative negligence. Negligence on the part of the plaintiff, however, may be shown, but it goes only in mitigation of damages. *ib.*
3. The liability of the owner or harborer of the dog rests upon his knowledge of the animal's dangerous propensities, and his allowing him to go at large where he may inflict injury. The authorities in the case of injuries by ferocious animal reviewed. *ib.*

—when municipal corporation liable for negligence in removing snow and ice from street.

See MUNICIPAL CORPORATION, 1, 2.

NEW TRIAL.

1. Where in an assessment of damages, in an action for malicious prosecution, the jury were erroneously instructed that an allegation of the complaint, as to the amount expended by the plaintiff, for costs and counsel fees, in defending the prosecution, stood admitted by the defendants, the court, on appeal, refused to allow the assessment to stand, upon the plaintiff's consenting to reduce the damages assessed by that amount, and ordered a reassessment, on the ground that the jury might have regarded the necessity of such expenditure, on the part of the plaintiff, as matter of aggravation, and on that account, given a greater sum, as general damage, than they otherwise would have done. *Thompson v. Lumley*, 74

2. Where on the trial the defendant had been the only witness as to the terms of a verbal agreement that the defendant alleged had been made between himself and the plaintiff, and the jury having found against him on the issue as to whether such an agreement had ever been made; on a motion for a new trial, on the ground of newly-discovered evidence, the defendant produced the affidavit of a person who swore to having heard such an agreement discussed between the plaintiff and defendant, and the plaintiff express a willingness to make it, and the defendant also swore that he had forgotten that the witness was present at any such conversation (which was eleven years before the trial), and that he was only reminded of it by the witness informing him of it after the trial. *Held*, 1. That although the defendant had testified generally to the making of the agreement, yet, as no testimony had been offered as to this particular interview, the testimony was not cumulative. 2. That the defendant's excuse for not having

produced the witness on the trial was reasonable, and that the evidence was of such a nature and weight under the circumstances as warranted the granting of a new trial. *Huebner v. Roosevelt*, 111

NEW YORK CITY.

1. The Health Department of the city of New York, created by the charter of 1873 (L. 1873. c. 335, § 80, p. 505), cannot sue for the penalty of \$50 for violation of a special order made by it, as the Metropolitan Board of Health (created by L. 1866, c. 74) could. *Health Department of the City of New York v. Pickney*, 260
2. The Health Department of the city of New York, created by the charter of 1873, is not such a continuation of the Metropolitan Board of Health, created by the act of 1866 (L. 1866, c. 74), as to make the statutory regulations for the enforcement of penalties under the latter body applicable to it. *ib.*
3. The provisions of the act amending the charter of 1873 (L. 1873, c. 757, § 12, p. 1125), by which the "authority, duty and powers" of the Metropolitan Board of Health are conferred upon the Health Department, did not give the Health Department power to sue for penalties in those cases where, by statute, the Metropolitan Board of Health had been entitled to do so. *ib.*
4. The Board of Commissioners of the Sinking Fund of the city of New York having passed a resolution employing the plaintiff to make an appraisal of property belonging to the city and county of New York, and by the same resolution having required the comptroller of the city of New York to make satisfactory arrangements with him as to his fees, and the plaintiff having arranged with the comptroller to leave the amount of his compensation to him upon the comptroller's promise that it should be liberal and satisfactory, and the comptroller never afterwards having fixed the amount. *Held*, that the plaintiff was en-

titled only to such sum as the jury should find was a reasonable compensation for the services performed by the plaintiff. *Bleecker v. The Mayor*, 439

5. *Held*, further, that after the services had been performed, a resolution of the board fixing the plaintiff's compensation at a certain sum did not, in the absence of the plaintiff's having acted upon the resolution by consenting to accept in payment for his services the sum so fixed, form a contract between the plaintiff and the board, and that the board having afterwards rescinded the resolution, it gave the plaintiff no right to recover that amount in an action against the city of New York. *ib.*
6. *It seems*, that the Board of Commissioners of the Sinking Fund of the city of New York have no power to have made, at the expense of the city of New York, an appraisal of county property, or of property the management of which is not within the scope of, or has no relation to, the powers and duties of that board. *ib.*
7. Since, by the charter of the city of New York (L. 1873, chs. 335 and 755), the police department is made a distinct and separate branch of the municipal government, and has complete control over the funds annually appropriated for its support and maintenance. *Held*, that the plaintiff, who had been employed by such department, could not—at least in the absence of proof that the appropriations were insufficient to meet its necessary expenses—recover from the corporation of the city of New York for services rendered upon such employment. *Waterman v. The Mayor*, 489
8. The case of *Dannat v. The Mayor, &c.* (66 N. Y. 585), followed as controlling. *ib.*

O

OFFICE.

1. The legality of the appointment of certain members of the Board

of State Commissioners of Public Charities cannot be inquired into in an equitable action to restrain them from doing certain acts which they claim by virtue of their appointment as such commissioners to have the power to do. *New York Juvenile Guardian Society v. Roosevelt*, 188

P

PARTIES.

See EQUITABLE LIEN, 6.

PARTNERSHIP.

1. Where a partner in the ordinary course of business insures property represented to the insurer to belong to the firm, and gives in payment of the premium the firm's promissory note, the other partners are liable on the note, even though the note was given without their consent or knowledge, and in violation of copartnership articles, if there was nothing in the nature of the transaction notifying the insurer of the latter facts. *Osgood v. Glover*, 367
2. Where an application was made to an insurance company, through a broker, for insurance, on account of a firm of merchants, on a ship, the loss, if any, payable to the firm and the company, upon the receipt of the firm's note signed in the name of the firm by one of the partners, issued a policy upon the ship as the property of the firm,—*Held*, that the company were not put upon inquiry as to whether or not the firm owned the ship, or whether or not the insurance was a firm transaction, and that the note bound all the partners, whether part owners of the ship or not. *ib.*
3. *It seems*, that the rule as to the liability of a partner on a firm note, given without his consent or knowledge, in a transaction not connected with the business of the firm, by another partner, is, that if the party taking the note is notified by the nature of the transaction that it is not connected with

partnership matters, the partner, not consenting and having no knowledge is not bound. *ib.*

4. The authorities as to notes given by a partner in transactions not connected with the business of the firm, collected and discussed by CHARLES P. DALY, Chief Justice. *ib.*

PATENTS.

1. By an agreement, otherwise valid, made prior to an application by a patentee for a renewal of his patent, a person may acquire from the patentee the right to such renewal when obtained, and such agreement is not in fraud of the law which allows such renewal only to the patentee. *Consolidated Fruit Jar Co. v. Mason*, 64

PAYMENTS.

1. Where there are two legally distinct accounts existing between plaintiff and defendant, the latter, whose defense is set-off of sums paid upon drafts drawn upon him by plaintiff, cannot be allowed to testify that he intended to apply the payments to the account which is the subject of plaintiff's claim, after testifying and producing clear proof that he had previously applied the payments on the other account. *Wright v. Wright*, 55
2. *It seems*, that where no application of a payment is made by either party, and there are two accounts, the law will presume the payment to have been made by the party in discharge of his obligation as trustee, having sureties for the faithful performance of his trust, rather than in discharge of a simple debt, created by operation of law. *ib.*

PLEADING.

1. Where an appeal is taken to the Court of Appeals, from an order granting a new trial, and that court affirms the order and directs judgment absolute on the stipulation given by the appellant, under § 11, subd. 2, of the (old) Code of

Civil Procedure, all the traversable allegations of the pleadings of the successful party stand admitted. *Thompson v. Lumley*, 74

2. Allegations of special damages are, however, not traversable, and consequently not thereby established, and the special damages alleged must still be established by the evidence on an assessment of damages, had upon such order for judgment absolute in the court to which the case is remitted by the Court of Appeals. *ib.*
3. In an action for malicious prosecution the amount of costs and counsel fees expended by the plaintiff, in defending the prosecution, is matter of special damage, and to be recovered, must be specially alleged and proved. *ib.*
4. *It seems*, that an admission in a pleading that about \$700 was paid is not an admission of the payment of \$700, and that the party claiming to recover the amount so paid must show by evidence the precise amount. *ib.*
5. In an action upon a promissory note, the defendant, under a general denial, may prove, as a defense a fraudulent alteration of the note made after its execution. *Schwartz v. Oppold*, 121
6. *Quære*. Whether upon principle such a defense is not new matter which should be set upon the answer. Per CHARLES P. DALY, Ch. J. *ib.*
7. A complaint in a justice's court which simply shows that the action is "for the recovery of personal property valued at eighty-five dollars" does not allege such a wrongful taking or detention of property as will sustain an action of replevin, and does not show any cause of action at all; and when in the justice's court this defect is pointed out, and the plaintiff having been given leave to amend, does not cure the defect, and against the objections of the defendant the justice allows the plaintiff to introduce evidence under such a complaint, instead of dismissing it, this court on appeal

- will not conform the pleadings to the proof, but will reverse the judgment. In such a case, this court on appeal is bound to reverse the judgment. *Howe Sewing Machine Co. v. Haupt*, 108
8. *It seems*, that in an action against an accommodation indorser of a note before delivery to the payee, an allegation in the complaint that the endorsement was made for the purpose of obtaining credit, for the maker with the payee is a sufficient allegation of the intention on the part of the indorser to become a surety for the maker of the note. *Schwarzansky v. Averill*, 254
9. In an action in the Marine Court on the official bond of a marshal, brought in the name of the party aggrieved, an allegation in the complaint that on a certain day leave was granted by the Court of Common Pleas to so bring such action, is sufficient upon demurrer. It is presumed that the leave was granted in a proper case. *Hauger v. Bernstein*, 340
10. The objection that the complaint in an action for the malicious prosecution, does not allege want of "probable cause," but only of "just" or "proper" cause, although it would, *it seems*, be good upon demurrer or a motion at trial to dismiss the complaint for insufficiency, is not available when raised for the first time upon appeal from an order vacating a dismissal of the complaint and granting a new trial. *Van De Wiele v. Callanan*, 386
11. Where a corporation organized by or under any statute of this State, in a suit by it desires to take advantage of the statutory provisions (2 R. S. 458, § 3, as amended by L. 1864, c. 422, and L. 1875, c. 508) relieving such corporations under certain circumstances from proving on the trial of suits by or against them, the existence of such corporation, it must allege in its complaint its incorporation by or under a statute of this State, and if it does not do so it must, on a general denial being interposed, prove its incorporation on

the trial. *Howe Machine Co. v. Robinson*, 399

12. Even in a case where the defendant, by having contracted with the plaintiff in its corporate name, is estopped from denying its incorporation when properly pleaded, and the plaintiff must still either properly allege the incorporation in its complaint or prove it on the trial, if a general denial be interposed. *ib.*
13. A complaint in the name of a corporation as plaintiff is a sufficient allegation of incorporation to sustain the action, provided due proof of such incorporation is made when required. *ib.*
14. Under a complaint for damages resulting to plaintiff from defendant's leaving cumbersome property on demised premises after expiration of the term, alleging that plaintiff did not receive possession until after the 2d of June, and was deprived of the benefit and enjoyment of the premises until the 18th of June, an answer counterclaiming damages for a wrongful entry on or about the 2d day of June, and a reply denying generally the allegations of the answer constituting the counter-claim, the plaintiff may give evidence of a peaceable entry with the defendant's consent on the 9th of June, and such evidence is not inconsistent with the plaintiff's pleadings, and a submission of the question of fact as to such peaceable entry and consent to the jury is proper under the issues raised. *Banks v. Carter* 417

POLICEMAN.

—power to arrest without warrant.

See CONSTABLE.

PRACTISE.

1. Where the court of Oyer and Terminer at the time of making an order forfeiting a recognizance grants a certiorari, the writ stays all proceedings on the forfeited

recognizance; and where the writ with the order allowing it and the other papers constituting the record in such a case are filed with the county clerk, his proceedings are stayed, and a docket of judgment made by him at the time of such filing, is erroneous, and will, on application to the general term of this court, be discharged. *People v. Devlin*, 47

2. The notice of entry of judgment of affirmance, required by sec. 348 of the (old) Code of Civil Procedure to be served upon the adverse party ten days before bringing suit upon an undertaking upon appeal, must be a written notice that there has been an entry of a perfected judgment. The statute must be strictly complied with, and the service of a paper purporting to be a copy of an order of affirmance, without any notice that it has been signed or entered, is insufficient, and an action upon the undertaking cannot be sustained upon proof of service of such an order ten days before suit. *Rae v. Harteau*, 95

3. Failure of proof of such notice cannot be supplied by showing that the defendant in the original suit, without waiting for notice of entry of the judgment, moved under L. 1871, c. 282, § 8, for a certificate to enable him to go to the Court of Appeals, nor by showing that the sureties, when demand of payment was made on them, did not base their refusal to pay on the failure to serve such notice. *ib.*

4. The fact that sureties on an undertaking on appeal have been indemnified, does not estop them in a suit on the undertaking from insisting on proof of performance of all the conditions required by the statute precedent to a suit on it. *ib.*

5. Under § 340 of the Code of Procedure (old Code), which provides that the undertaking to stay execution pending appeal may be in one instrument or several, where an undertaking by two sureties fails of approval because one of the sureties is insufficient, if, afterwards, a separate undertaking is executed by another surety alone,

he is bound, although the former undertaking, by reason of having failed of approval, has become void. *Gottwald v. Tuttle*, 105

6. Judgment as for want of an answer cannot be given at trial, for the reason that the defendant there testifies that he did not verify his answer to the verified complaint. An objection at the trial that a pleading is unverified is too late. *ib.*

7. The court in its discretion will refuse to allow a judgment in an equitable action affecting partnership assets in which creditors are interested, to be entered by consent of plaintiff and one of the defendants, his copartner, where another defendant, the assignee for the benefit of creditors of plaintiff's interest in the firm, does not appear to have had notice of the action, or to have appeared, and where the form of judgment consented to, names a receiver and referee, would affect creditors not before the court, and would give the plaintiff's attorney a prior lien upon the assets for costs and for counsel fees to an unknown amount. *Plonsky v. Japha*, 226

8. Since the amendment to the Code in 1851, a judge at trial term may set aside a dismissal of a complaint, in an action tried before him with a jury. *Van de Wiele v. Callanan*, 386

PRINCIPAL AND AGENT.

1. Where a person without authority assumes to make a contract in the name of another, he does not thereby become personally liable on the contract, and the only remedy against him of the person contracted with is by an action for deceit in case he has acted fraudulently, or if there were no fraud therein, by an action for the breach of the warranty of authority. *Noe v. Gregory*, 283

2. Whenever a person assumes to act as the agent of another, he impliedly warrants that he has authority to so act. *ib.*

3. A recognition and ratification by

an insurance company of the acts of one who solicits for it a risk and fills up an application for insurance, establishes his relation as agent of the company, in respect to such acts, and any errors or omissions of the agent in the course of such acts are the errors and omissions of the company. *Mowry v. The World Mutual Life Ins. Co.*, 321

4. Where the principal clerk of an incorporated fire insurance company, whose duties were to receive applications, fill out policies and renewals, and to "generally attend to whatever was transacted behind the counter," made at the place of business of the company a parol contract of insurance with an applicant, *held* that the company were bound by the act of the clerk. *Cooke v. Aetna Ins. Co.*, 555

PUBLIC MORALS.

1. The plaintiff purchased from the defendant the right to exhibit at a fair held by it a certain article manufactured by her and known as an "abdominal supporter," and also the right to an allotment of space in the defendant's building for the purpose of such exhibition, such rights purchased by the plaintiff being subject to the condition of a right in the board of managers of the defendant to refuse admission to any one whom they might consider an improper person, and to remove the goods of such exhibitor, and also to exclude any article they might deem objectionable, and the plaintiff, in connection with the exhibition of her manufacture, exposed and circulated a circular in relation thereto—part of the circular being in capital letters—in which it was stated that the article was especially adapted "to the treatment of the various displacements of the uterus, and a relaxed state of the abdominal parts," and "for causing the womb and other organs to assume their natural positions," and that "ladies would find great comfort in wearing them before and after confinement," and that "in cases of pregnancy or very large abdomen No. 2 should be ordered," and that "they can

be washed," and that orders should be "accompanied with measure around the largest part of the hips." When the character of this circular was brought to the attention of the board of managers of the defendant they directed its suppression, and notice of their action was given to the plaintiff, and she was notified that if she did not suppress the circular or modify it her privileges would be withdrawn and her goods removed from the exhibition. After she had persistently refused to do either, and after the amount paid by her for her privilege of exhibition had been tendered her, she was excluded from admission as an exhibitor, and her goods removed from the exhibition. *Held*, that the character of the circular and the plaintiff's refusal to suppress or modify it justified such exclusion and removal under the conditions on which plaintiff purchased her privilege to exhibit. Per *ROBINSON, J. Smith v. The American Institute of the City of New York*, 526

R

RECEIVER.

1. *Quære*, whether an admission of service of an order to show cause why a receiver should not be appointed of a corporation, in proceedings by the attorney-general to dissolve it, made by the attorneys of the corporation, is sufficient to give the court jurisdiction to make the order appointing the receiver. *Bedell v. North America Life Ins. Co.*, 273

REFERENCE.

A referee appointed by the court in a referable action to hear and determine the issues where he is not willing to act for the statutory compensation, and one of the parties is unwilling to agree to pay a higher rate, should not declare that he will go on with the reference, and expect to be paid such higher rate, and look to the prevailing party therefor, and hold his report as security for such payment unless ordered to give it up without such payment, and where

the counsel for the party objecting to such increased compensation in such a case, thereupon refused to proceed, and withdrew. *Held*, that they were justified in refusing to proceed with the trial under such conditions, and that the referee should be removed and another appointed in his place. *Devlin v. The Mayor*, 408

REMOVAL OF SUITS TO UNITED STATES COURTS.

1. Under the act of Congress of March 3d, 1875, which provides that any suit of a civil nature at law or in equity, now pending or hereafter brought in any State court, when the matter in dispute exceeds \$500 and in which there shall be a controversy between citizens of different States, may be removed by either party into the Circuit Court of the United States for the proper district. *Held*, that the defendant could remove a suit in this court for a balance of account brought against him by an assignee of it, who was a citizen of a different State, though his assignor in whose favor the debt was contracted was a citizen of the same State as the defendant. *Leutze v. Butterfield*, 24
2. Congress, by the act of 1875, in changing the rule in this respect, but exercised within constitutional limits the power conferred on it by the Constitution. Per ROBINSON, J. *ib.*
3. Where a case is within the provisions of the act of 1875, providing for a removal of a suit from a State to a federal court, and a party has complied with all the requirements of the act to effect such removal, if the suit is thereafter proceeded with in the State court, such proceedings are *coram non judice*, and the judgment entered therein will, on an appeal by the party seeking the removal, be reversed. *ib.*

RESIDENCE.

Where a minor residing with his parents in this country was sent by them to a foreign country to be educated, and after having there

completed a course of study and before the end of his minority, returned and again resided with his parents here. *Held*, that by going to a foreign country for such a purpose he did not change his residence, and that the years spent by him in such foreign country were to be computed as years of residence here in determining whether he was entitled to be admitted as a citizen of the United States. *Matter of Rice*, 22

RESTITUTION.

—when restitution on reversal of judgment is matter of discretion, and how applied for on appeal from District Courts.

See APPEAL, 6, 7.

S

SALE.

1. Where the defendants agreed to sell and deliver to the plaintiff oil of a specified quality, and in fulfillment of that contract tendered certain oil which the plaintiff, after an actual inspection and examination of it, accepted and shipped to Havre, where a certain portion of it was discovered to be of an inferior quality, but the plaintiff did not offer to return any of it to the defendants but sold the entire quantity and received the proceeds. *Held* (following *Reed v. Randall*, 29 N. Y. 358), that the plaintiff could not make any claim for damages on account of the inferior quality of the oil. *Heydecker v. Lombard*, 19
2. Where the plaintiff, upon discovering that certain oil that had been delivered to him under an executory contract of sale, was of a quality inferior to that called for by the contract, notified the defendants of the fact and asked them for directions about it and was told to do every thing that the claim might be well established against whom it might concern. *Held*, that this did not amount to an offer to return the oil and a refusal to accept it. *ib.*

3. It is a defense to an action by a vendee for damages for non-delivery, that the vendee and a confederate were engaged in the attempt to obtain the sale and delivery of the goods for promissory notes of a third party known to them to be worthless, although the vendor, who discovered the fraud during the attempt, allowed the sale but not the delivery to be consummated, and with the intent only of securing possession of the notes as evidence of attempted fraud;—if such vendor at the trial tenders back the worthless notes. *Royce v. Watrous*, 87

4. The plaintiff took a bill of sale of goods, paying the price named therein, and executing a written agreement to return them at an advance specified, if the former owners desired to repurchase within two months, and, in that event, to pay over the proceeds of those sold meantime, less ten per cent. commission, and the testimony of the parties to the transaction was conflicting as to whether it was an absolute sale or a transfer as security for the sum advanced. *Held*, that on the face of the instruments, in the absence of evidence going to show fraud on the part of the buyer, or undue inadequacy in the price paid, the transaction was in effect an absolute sale with a right to repurchase, and valid as against creditors levying on the goods under execution against the vendor, and that on the conflict of testimony, the jury should determine the character of the transaction. *Mahler v. Schloss*, 291

5. The evidence as to the change of possession being in conflict. *Held*, that, assuming that the vendor remained in possession, as was found by the jury, the plaintiff was entitled to go to the jury on the question of the *bona fides* of the transaction on his part. The weight of the evidence on the question of the change of possession, considered. *ib.*

6. An instruction to the jury by the judge at the trial, that "if it was a conditional sale, then it was void as against creditors,"—*Held*, error. *ib.*

7. An instruction that if it was a mortgage, it was void for the reason that the creditors had the right to take the goods under the execution against the former owners, the goods being in the possession of the latter, and being to all intents and purposes theirs,—*Held*, erroneous, the questions of the character of the transaction, and of the plaintiff's good faith, not being submitted to the jury, *ib.*

SHERIFF.

A sheriff is under no obligation to execute a void process regular upon its face. *Josuez v. Conner*, 452.

SLANDER.

In an action for slander the defendant may show in mitigation of damages that the slanderous words complained of were spoken by him in the heat of passion, occasioned by recent conduct of a provoking character on the part of the plaintiff, and therefore *Held*, that in mitigation of damages for having called the plaintiff a thief and a scoundrel; with having made false entries in the defendant's books, and having sold goods for the defendant and collected more than he returned or accounted to the defendant for, the defendant might show that the plaintiff had been discharged from the defendant's employ about two months previous to the time when the slanderous words were spoken, and that after his discharge the plaintiff had gone about among the defendant's customers warning them against him, saying that he would charge them usurious interest, sell them out, and break them up. *Palmer v. Lang*, 33

SECURITY FOR COSTS.

1. A defendant, upon the commencement of an action against him by an infant, is entitled to an appearance by such infant by a guardian *ad litem* who is pecuniarily responsible for his costs. But if the defendant does not raise the question of the guardian's responsibility as soon as apprised of the person appointed, he acquiesces in his sufficiency to act in that capacity,

and cannot afterwards attack it.
Wice v. The Commercial Insurance Co., 258

2. Where, therefore, after judgment for the defendant, an application was made to have all proceedings in the action on the part of the plaintiff stayed until payment of the defendant's costs:—*Held*, that the court, in the absence of some statutory provision, had no power to grant such an application. *ib.*

SUPPLEMENTARY PROCEEDINGS.

1. Where it appears in supplementary proceedings that personal property in the possession of the judgment debtor and belonging to him, has been mortgaged by him to another, by a chattel mortgage payable on demand, a judge before whom the proceedings are had, cannot order the debtor to deliver the property to a receiver appointed by him. *Griswold v. Tompkins*, 214
2. Where after the appointment of a receiver in supplementary proceedings personal property belonging to the judgment debtor, and in his possession, is levied on under an execution against his property, the judgment debtor cannot be ordered to deliver the property to the receiver, but the receiver must be left to his action against the sheriff seizing it to recover it from him. *ib.*

SURROGATES.

1. Proof of services rendered from year to year as "recording clerk" of a surrogate, is not sufficient to make out a case of employment under the Act of 1828, chap. 134, concerning the appointment of assistants by a surrogate to record the papers left unrecorded by his predecessor, or to justify the audit of a claim for such services as a county charge. *Donnelly v. The Mayor, &c.*, 334

It seems, that act contemplates services of a temporary and special nature, although it is the duty of the surrogate, when the exigency arises, to employ such services,

and they will then be a county charge, the person claiming pay from the county by reason of appointment under that act, must show that the necessity for his employment under the act, existed. *ib.*

T

TRADE-MARK.

1. Words in common use as descriptive of medicines for particular diseases, or which merely indicate by its common name an ingredient of a medicine, cannot be appropriated by a manufacturer of such medicine as a trade-mark, nor can a combination of such words be so appropriated. *Caswell v. Davis*, 58 N. Y. 223, followed as controlling. *Ayer v. Rushton*, 9
2. Plaintiffs invented and prepared a medicine for chest diseases to which they gave the name of "Cherry Pectoral," and which was extensively known and sold as "Ayer's Cherry Pectoral;" one of the ingredients was extract of wild cherry, and the word "pectoral" had been before the invention of plaintiffs' medicine applied to medicines for chest diseases. *Held*, that the plaintiffs could not claim the exclusive use of the words "Cherry Pectoral" as a trade-mark. *ib.*

TRESPASS.

The mere possession of personal property is sufficient to sustain an action for the wrongful taking of it by an officer acting under insufficient process, and he cannot defend his wrongful taking by attacking the title of the person from whose possession he took it. *Oberwarth v. McLean*, 70

TRIAL.

1. Where, upon the plaintiff's motion, a verdict has been directed against the defendant, to which the defendant has excepted, the facts to be considered in determining the property of that direction, are those specifically proven by the evidence for the defendant and those which may be reasonably inferred from that evidence, and if

such facts contradict plaintiff's evidence and constitute a defense, the question of fact should be submitted to the jury. *Royce v. Watrous*, 87

2. Where the defendant on cross-examination elicited the same statement that the witness had made on the direct, and then moved to strike it out, which the court refused:—*Held*, that he was not injured; for if his motion had been granted, it would not have shut out the evidence, as it was in on the direct, and it was then too late to strike it out in the direct. *Lynch v. McNally*, 128

3. Where there is a conflict of evidence as to an essential issue, it is error for the court in effect to itself decide that issue from its own view of the evidence, and while allowing the case to go to the jury on the question of damages to refuse to allow the question of fact involved in that issue to go to the jury. *Banks v. Carter*, 421

4. Where, at the close of the case, counsel made requests to charge several propositions of law applicable to the case, and the court afterwards in its charge did not include or refer to the points requested, and subsequently on its attention being called to the omission, refused to alter its charge,—*Held*, that exceptions then taken to each refusal to charge as before requested were specifically taken and were to be considered on appeal. *Betz v. Conner*, 550

TRUSTS.

1. When a patentee in an agreement for the formation of a corporation, for a valuable consideration, transfers to the corporation his patent, and agrees that any extension of the patent shall be for the benefit of and belong to the corporation, and afterwards, while a trustee of the corporation, obtains a reassignment of the patent for the purpose of obtaining an extension, obtains an extension, but before doing so secretly grants to a third party a license to use and make the patented invention under the extension, and then assigns

the extended patent to the corporation, such a grant is a violation of trust, a fraud upon the corporation, and the use of the license by the grantee with notice may be restrained by injunction. *Consolidated Fruit Jar Co. v. Mason*, 64

2. A trustee who has taken lands under a deed from a husband in trust to convey to his wife, or her appointee, cannot, after having conveyed to the appointee, and after the appointee has conveyed to the wife, obtain any right, by forcibly taking those deeds from the wife's possession, to hold the property until he is repaid by the wife expenses incurred by him as trustee, nor is he entitled to a personal judgment against the wife therefor. Such a trust is executed, and ceases when a proper deed has been executed and delivered to the appointee, although the deed may not have been recorded. *Krekeker v. Thaule*, 152

U

UNLAWFUL COMBINATION.

See CONSPIRACY.

VENDOR AND VENDEE.

1. A purchaser at a foreclosure sale is not obliged to bear the loss occasioned to the premises by a fire occurring intermediate the time when the premises are bid off by him and the time at which he becomes entitled to a deed; but he is not entitled to be relieved from his contract of purchase in consequence of the damage to the premises occasioned by such a fire, where the damage is comparatively slight, and a full and adequate compensation for it is offered to him. *Aspinwall v. Balch*, 200

Where premises were situated on Broadway in the city of New York, and had been bid off for \$62,500, and the value of the premises consisted chiefly in the value of the land, the building upon it being old and dilapidated, adding very little to the value of the land, and intermediate the day of the sale and the day when the purchaser was entitled to a deed, the building was

damaged by fire to the amount, as estimated by competent appraisers, of \$125. *Held*, that the purchaser was not entitled to be relieved from his bid, but that upon the premises being repaired, or an adequate compensation therefor being tendered him, he was bound to pay the purchase price. *Held*, further, however, that an offer to transfer to the purchaser a contract of insurance on the premises for an amount sufficient to cover the loss was not a good tender of compensation. *ib.*

2. The test as to whether or not, in case of damage to or destruction of the buildings on the premises before the day for the delivery of the deed, the purchaser is entitled to be relieved from his bid, is whether the substantial inducement to the purchase has failed, and this cannot be predicated where a slight damage has been done to the buildings by fire, which can be readily compensated for out of the purchase money or otherwise. *ib.*

V

VISITATORIAL POWERS.

—of State Commissioners of Public Charities.

See ELEMOSYNARY CORPORATION,
1, 2.

W

WARRANTY.

Where the answer of the insured to the question, in the application for a policy of life insurance, "Occupation? Please state definitely," was "Manfg." — *Held*, that a breach of warranty was not shown by proof that the insured, at the time the answer was given, was keeping a billiard saloon, though he had for years previous been a manufacturer of soda water, and was about to resume that business. *Mowry v. The World Mutual Life Ins. Co.* 321

Where the assertions of the insured in his application for a policy of life insurance were, that he had

not, during the last ten years, had any sickness or disease, and had not employed or consulted a physician for himself:—*Held*, that a breach of warranty was not shown by proof that within a year previous to the application a physician had given the insured advice and medicine, it not appearing whether either the advice or medicine were for the insured personally or for his family. *ib.*

Where a breach of warranty is relied upon by an insurance company as ground for forfeiting the policy, the warranty is to be strictly construed against the company. *ib.*

WITNESS.

1. A witness cannot be impeached by showing that certain circumstances to which he has testified on the present trial were omitted by him when testifying concerning the same occurrence on a former trial of the action, unless at the former trial the attention of the witness was particularly called to the circumstances which he then omitted to state. *Huebner v. Roosvelt*, 111
2. For the purpose of discrediting a witness, it is not competent to put in evidence an indictment or sworn charges made before a magistrate against him, where he is not shown to have been convicted thereon. A record of the conviction would be admissible for that purpose, but not a mere complaint or an indictment. *West v. Lynch*, 245
3. A resident of a foreign State cannot be served with process for the commencement of an action against him while attending in this State as a witness in a cause pending in one of the courts of this State or one of the courts of the United States held herein. *Grafton v. Weeks*, 523
4. So *held* where the person served with process was a resident of New Hampshire, and was served with a summons in an action in this State court while attending in this State as a witness in a cause pending in the Circuit Court of the United States for the Southern District of New York. *ib.*

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